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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA

FROM MARCH 18, 1914, TO NOVEMBER 23, 1914

OFFICIAL REPORT

VOLUME 49

SAN FRANCISCO
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1915

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JUSTICES

OF

THE SUPREME COURT OF THE STATE OF MONTANA,

DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

THE HON. SYDNEY SANNER, }

OFFICERS OF THE COURT:

D. M. KELLY, Attorney General.

W. H. POORMAN, Asst. Attorney General.

J. H. ALVORD, Asst. Attorney General.

CHAS. S. WAGNER, Asst. Attorney General.

JOHN T. ATHEY, Clerk.

MARSHALL N. RACE, Marshal.

AUGUST C. SCHNEIDER, Court Stenographer.

ATTORNEYS AND COUNSELORS AT LAW.

Admitted from May 20, 1914, to December 24, 1914.

ALLEN, EDWIN M., December 7, 1914.
ALLEY, ENOS E., September 21, 1914.
ANGELL, EARL F., June 24, 1914.
ANDRUS, RALPH R., September 26, 1914.

BARTON, C. D., June 24, 1914.
BECKETT, AMBROSE M., June 25, 1914.
BLODGETT, FRANCIS E., December 24, 1914.
BOTTUM, FRANK, November 23, 1914.
BRISCOE, JACK, December 21, 1914.
BROOK, I. J., October 5, 1914.
BROWN, MARCUS E., June 15, 1914.

CAMERON, EARL E., September 15, 1914.
CAPWELL, JOSEPH A., June 29, 1914.
CARLETON, FRANK E., May 25, 1914.
CHAPPLE, HENRY A., September 14, 1914.
CLARK, EDWARD T., November 25, 1914.
CLIFFORD, THOS. F., September 28, 1914.
COFFEY, JR., GEORGE, December 24, 1914.
COLLETT, CHARLES E., September 14, 1914.
CURE, C. J., June 29, 1914.

DAVIS, NEHEMIAH, September 28, 1914.
DEMEL, C. W., September 28, 1914.
DERBY, GUY C., December 24, 1914.
DOEPKER, MARK J., December 24, 1914.
DORNBLASER, PAUL, December 24, 1914.
DOWNEY, T. E., December 24, 1914.
DUDLEY, BEVERLY S., October 5, 1914.

ELLEFSON, EDWARD K., June 29, 1914.
ELLIOTT, JOHN, June 30, 1914.
ELWELL, RHEA, December 24, 1914.
ERICKSON, ARTHUR C., June 22, 1914.

FASEL, ELSA M., December 24, 1914.
FERGUSON, V. L., June 25, 1914.
FLACHSENHAR, WALTER R., December 7, 1914.

GOBLE, WEBSTER A., September 28, 1914.
GRANT, WALTON H., July 9, 1914.
GRAY, FRANK M., January 2, 1914.

HAGENSTEIN, GUSS, July 9, 1914.
HALL, H. C., October 19, 1914.
HEALY, J. PETER P., June 15, 1914.
HERON, BENJAMIN F. L., September 28, 1914.

JEANNETTE, WILMER, December 24, 1914.
JONES, WM. E., November 23, 1914.

KAUFMAN, JOE A., December 24, 1914.
KAVANEY, JOHN A., November 30, 1914.

KELLY, E. PATRICK, July 25, 1914.
KILLAM, ALVIN K., July 13, 1914.
KINNEY, EDMOND P., June 24, 1914.

LAIRD, GEO. M., December 24, 1914.
LAMEY, ARTHUR F., October 19, 1914.
LOBLE, LESTER H., December 24, 1914.
LORENZ, LEWIS F., December 24, 1914.

MARQUIS, THOMAS B., June 25, 1914.
MATSON, ENOR K., September 26, 1914.
MCCABE, E. J., December 24, 1914.
MCCLORY, JOHN S., June 15, 1914.
MCDERMOTT, F. H., September 14, 1914.
MCMILLAN, R. O., November 30, 1914.
MERCER, WALTER W., November 16, 1914.
MILLS, CLAUDE C., November 23, 1914.
MINSON, GEO. H., June 22, 1914.
MORGAN, D. H., June 23, 1914.
MULRONEY, ROBERT E., November 9, 1914.
MURN, THOS. M., June 26, 1914.
MUZZY, JOHN B., December 14, 1914.

NALE, HARRY B., June 8, 1914.

PERKINS, EDD LEWIS, June 8, 1914.

REIMER, GUSTAVE, September 21, 1914.
RENSHAW, FRED E., June 15, 1914.
ROBINSON, THOS., December 24, 1914.
ROYER, PAUL H., July 13, 1914.
RUSSELL, V. C., June 24, 1914.

SEWELL, HARRY F., December 24, 1914.
SHEA, JAMES T., December 24, 1914.
SHELDON, RAYMOND B., September 21, 1914.
SORENSON, CHARLES C., December 24, 1914.
STEPHENSON, W. S., June 24, 1914.

TATE, FRED R., May 25, 1914.

ULSAKER, OSCAR M., December 7, 1914.

VALE, FRANKLIN E., June 22, 1914.
VON DEM BUSSCHE, C. F., December 24, 1914.

WALKER, BURTON W., November 2, 1914.
WARD, JOHN M., December 24, 1914.
WILLIAMS, FRANK D., September 14, 1914.
WRIGHT, EARL E., October 6, 1914.
WRIGHT, FRANK A., July 11, 1914.

DIRECTORY

OF THE

JUDICIAL DISTRICTS OF THE STATE OF MONTANA.

1915.

First Judicial District.

County of Lewis and Clark. County Seat, Helena.
District Judges: Hon. James M. Clements; Hon. J. Miller Smith.
Officers: County Attorney, Andrew H. McConnell, Esq.
Clerk of District Court, F. L. Reece.
Sheriff, Rolla Duncan.

Second Judicial District.

County of Silver Bow. County Seat, Butte.
District Judges: Hon. Michael Donlan; Hon. J. J. Lynch; Hon. J. B. McClernan.
Officers: County Attorney, M. F. Canning, Esq.
Clerk of District Court, John J. Foley.
Sheriff, Chas. S. Henderson.

Third Judicial District.

Counties of Deer Lodge, Powell and Granite.
District Judge: Hon. George B. Winston.
Officers of Deer Lodge County (County Seat, Anaconda):
County Attorney, John W. James.
Clerk of District Court, M. L. McDermott.
Sheriff, B. N. Bryan.

Officers of Powell County (County Seat, Deer Lodge):
County Attorney, Thos. F. Shea, Esq.
Clerk of District Court, Robert Midtlyng.
Sheriff, Jos. E. Neville.

Officers of Granite County (County Seat, Philipsburg):
County Attorney, David M. Durfee, Esq.
Clerk of District Court, Wm. B. Calhoun.
Sheriff, Daniel A. McLeod.

FOURTH JUDICIAL DISTRICT.

Counties of Mineral, Missoula, Ravalli and Sanders.

District Judges: Hon. A. L. Duncan; Hon. R. Lee McCullough;
†Hon. Theodore Lentz.

*Officers of Mineral County (County Seat, Superior):
County Attorney, Wilfrid L. Hyde.
Clerk of District Court, George L. Dean.
Sheriff, A. F. Klugman.

Officers of Missoula County (County Seat, Missoula):
County Attorney, F. C. Webster, Esq.
Clerk of District Court, Thos. P. Conlon.
Sheriff, R. J. Whitaker.

Officers of Ravalli County (County Seat, Hamilton):
County Attorney, E. C. Kurtz, Esq.
Clerk of District Court, J. T. Coughenour.
Sheriff, B. S. Chaffin.

Officers of Sanders County (County Seat, Thompson Falls):
County Attorney, Wade R. Parks, Esq.
Clerk of District Court, Wm. Strom.
Sheriff, Joseph L. Hartman.

---

*County of Mineral created August 7, 1914.

†Proceedings in *quo warranto*, to oust Judge Lentz, elected Nov. 4, 1914, instituted on January 8, 1915, by Hon. John E. Patterson appointed judge of the Fourth Judicial District on February 13, 1913, under Chapter 14, Laws of 1913, for a term ending the first Monday, 1917.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Joseph B. Poindexter; Hon. W. A. Clark.

Officers of Beaverhead County (County Seat, Dillon):

County Attorney, Roy S. Stephenson, Esq.
Clerk of District Court, Chas. W. Conger.
Sheriff, Daniel V. Erwin.

Officers of Jefferson County (County Seat, Boulder):

County Attorney, J. E. Kelly, Esq.
Clerk of District Court, W. B. Hundley.
Sheriff, P. J. Manning.

Officers of Madison County (County Seat, Virginia City):

County Attorney, Geo. R. Allen, Esq.
Clerk of District Court, Matt Carey.
Sheriff, Elijah Adams.

SIXTH JUDICIAL DISTRICT.

Counties of Park, Stillwater and Sweet Grass.

District Judge: Hon. Albert P. Stark.

Officers of Park County (County Seat, Livingston):

County Attorney, Frank Arnold, Esq.
Clerk of District Court, Wm. Pethybridge.
Sheriff, A. S. Robertson.

Officers of Stillwater County (County Seat, Columbus):

County Attorney, P. R. Heily, Esq.
Clerk of District Court, G. Iverson.
Sheriff, Robert Guthrie.

Officers of Sweet Grass County (County Seat, Big Timber):

County Attorney, R. S. Steiner, Esq.
Clerk of District Court, H. C. Pound.
Sheriff, H. G. Lyons.

SEVENTH JUDICIAL DISTRICT.

Counties of Custer, Dawson, Fallon, Richland and Wibaux.
District Judge: Hon. C. C. Hurley.

Officers of Custer County (County Seat, Miles City):
County Attorney, Frank Hunter, Esq.
Clerk of District Court, Jas. G. Ramsay.
Sheriff, Austin B. Middleton.

Officers of Dawson County (County Seat, Glendive):
County Attorney, S. E. Felt, Esq.
Clerk of District Court, Frank Parrett.
Sheriff, Geo. Twible, Jr.

*Officers of Fallon County (County Seat, Baker):
County Attorney, Charles J. Dousman, Esq.
Clerk of District Court, Ralph Keener.
Sheriff, M. E. Jones.

Officers of Richland County (County Seat, Sidney):
County Attorney, Herbert H. Hoar, Esq.
Clerk of District Court, Guy L. Rood.
Sheriff, Geo. W. Arkle.

†Officers of Wibaux County (County Seat, Wibaux):
County Attorney, Edward F. Fisher, Esq.
Clerk of District Court, A. E. Jeffers.
Sheriff, J. W. Jones.

EIGHTH JUDICIAL DISTRICT.

Counties of Cascade, Teton, and Toole.
District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls):
County Attorney, Geo. A. Judson, Esq.
Clerk of District Court, Geo. Harper.
Sheriff, Louis H. Kommers.

---

*County of Fallon created December 13, 1913.
†County of Wibaux created August 17, 1914.

Officers of Teton County (County Seat, Chouteau):
County Attorney, John J. Greene, Esq.
Clerk of District Court, James Gibson.
Sheriff, William Miller.

Officers of Toole County (County Seat, Shelby):
County Attorney, J. G. Henderson, Esq.
Clerk of District Court, Perry J. Day.
Sheriff, J. S. Alsup.

NINTH JUDICIAL DISTRICT.

County of Gallatin. (County Seat, Bozeman):
District Judge: Hon. Ben. B. Law.

Officers: County Attorney, H. A. Bolinger, Esq.
Clerk of District Court, W. L. Hays.
Sheriff, D. E. Gray.

TENTH JUDICIAL DISTRICT.

County of Fergus. (County Seat, Lewistown):
District Judge: Hon. Roy E. Ayres.

Officers: County Attorney, Frank A. Wright, Esq.
Clerk of District Court, James L. Martin.
Sheriff, Firmin Tullock.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.
District Judge: Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell):
County Attorney, T. A. Thompson.
Clerk of District Court, Sam. D. McNeely.
Sheriff, J. H. Metcalf.

Officers of Lincoln County (County Seat, Libby):
County Attorney, Jas. M. Blackford, Esq.
Clerk of District Court, Timothy Miller.
Sheriff, Waverly L. Brown.

TWELFTH JUDICIAL DISTRICT.

Counties of Blaine, Chouteau, Hill, Sheridan and Valley.
District Judges: Hon. John W. Tattan; Hon. Frank N. Utter.

Officers of Blaine County (County Seat, Chinook):
County Attorney, D. J. Sias, Jr., Esq.
Clerk of District Court, A. W. Ziebarth.
Sheriff, Jas. Buckley.

Officers of Chouteau County (County Seat, Fort Benton):
County Attorney, H. F. Miller, Esq.
Clerk of District Court, Geo. D. Patterson.
Sheriff, I. M. Rogers.

Officers of Hill County (County Seat, Havre):
County Attorney, L. V. Beaulieu, Esq.
Clerk of District Court, Geo. W. Glass.
Sheriff, H. E. Loranger.

Officers of Sheridan County (County Seat, Plentywood):
County Attorney, Paul Babcock, Esq.
Clerk of District Court, L. J. Onstad.
Sheriff, J. B. Duggan.

Officers of Valley County (County Seat, Glasgow):
County Attorney, Geo. W. Ruffcorn, Esq.
Clerk of District Court, Walter Shanley.
Sheriff, C. W. Powell.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Musselshell, Rosebud, Yellowstone, and Big Horn.
District Judges: Hon. Geo. W. Pierson; Hon. Chas. L. Crum.

Officers of Carbon County (County Seat, Red Lodge):
County Attorney, R. G. Wiggenhorn, Esq.
Clerk of District Court, H. A. Simmons.
Sheriff, W. H. Gebo.

Officers of Musselshell County (County Seat, Roundup):

County Attorney, Garry J. Jeffries, Esq.
Clerk of District Court, W. G. Jarrett.
Sheriff, J. L. Fisco.

Officers of Rosebud County (County Seat, Forsyth):

County Attorney, B. D. Tull, Esq.
Clerk of District Court, D. J. Muri.
Sheriff, Henry Grierson.

Officers of Yellowstone County (County Seat, Billings):

County Attorney, Jas. L. Davis, Esq.
Clerk of District Court, Lorin T. Jones.
Sheriff, S. W. Matlock.

Officers of Big Horn County (County Seat, Hardin):

County Attorney, H. W. Bunston, Esq.
Clerk of District Court, Frank A. Nolan.
Sheriff, Dewey Riddle.

FOURTEENTH JUDICIAL DISTRICT.

Counties of Meagher and Broadwater.

District Judge: Hon. John A. Matthews.

Officers of Meagher County (County Seat, White Sulphur Springs):

County Attorney, C. A. Linn, Esq.
Clerk of District Court, F. H. Mayn.
Sheriff, Geo. B. Nagues.

Officers of Broadwater County (County Seat, Townsend):

County Attorney, Chas. P. Cotter, Esq.
Clerk of District Court, Fred Bubser.
Sheriff, Chas. B. Doggett.

TABLE OF CASES REPORTED—VOL. 49.

Alderson, State (ex rel. General Electric Co.) v..... 29
Alderson, State (ex rel. Hay) v..... 387
Allard Guardianship, In re..... 219
American Mining Co., Ltd., Kleinschmidt v..... 7

Bain, Croft v..... 484
Bank of Montana, St. John v..... 613
Barnett, State (ex rel. Frost) v..... 252
Bass etc. Ranch Co., Dwight v..... 612
Beaverhead County, Flynn v..... 347
Best Manufacturing Co. v. Hutton..... 78
Blaine, Kerr v..... 602
Blair v. Peterson..... 615
Board of Commissioners, State (ex rel. Donlan) v..... 517
Board of Commissioners, State (ex rel. Wood) v..... 165
Burles v. Oregon Short Line R. R. Co..... 129
Butori, Rule v..... 342

Centennial Brewing Co. v. Rouleau..... 490
Chellquist v. Eustance..... 96
Chesnut v. Sales..... 318
Chessman, Parchen v..... 326
Chicago, M. & P. S. Ry. Co., Gary Bros. & Gaffke Co. v.... 524
Chicago, M. & P. S. Ry. Co., White v..... 419
City of Missoula, Shapard v..... 269
Cole v. Helena L. & Ry. Co..... 443
Cooper v. Romney..... 119
Corscadden, Pentz v..... 581
Croft v. Bain..... 484
Culbertson Ferry Co. v. Hinz..... 614
Curtis v. Parham 140

Daly, Pierson v..... 478
Dean v. Stewart..... 506

Dean, Welch v..... 263
District Court, State (ex rel. Carlson) v..... 611
District Court, State (ex rel. Cook) v..... 615
District Court, State (ex rel. Cotter) v..... 146
District Court, State (ex rel. Culbertson Ferry Co.) v..... 595
District Court, State (ex rel. Driscoll) v.....614, 616
District Court, State (ex rel. Duncan) v..... 614
District Court, State (ex rel. Little) v..... 158
District Court, State (ex rel. Lohman) v..... 247
District Court, State (ex rel. McConnell) v..... 158
District Court, State (ex rel. More) v..... 577
District Court, State (ex rel. Slack) v..... 610
Driscoll, State v..... 558
Dubbels v. Thompson..... 550
Duff v. Sweet..... 610
Duncan, Mayor etc., State (ex rel. Dwyer) v..... 54
Dunning, Loeffler v..... 177
Dwight v. Bass etc. Ranch Co..... 612

Edwards v. Plains Light & Water Co..... 535
Eldridge, Lukert v..... 46
Eustance, Chellquist v..... 96

Flathead Independent Tel. Co., Howard v..... 197
Flynn v. Beaverhead County..... 347

Gary Bros. & Gaffke Co. v. Chicago, M. & P. S. Ry. Co..... 524
Gibson, Admx., v. Morris State Bank..... 60
Green, Sutherland v..... 379
Groom, State v..... 354

Halk, State v..... 173
Hanson, State v..... 361
Hanson, Trogdon v..... 1
Hauswirth, Northern Pacific Ry. Co. v..... 135
Helena Light & Ry. Co., Cole v..... 443
Hicks v. Rupp..... 40

Hillman v. Luzon Cafe Co..... 180
Hinz, Culbertson Ferry Co. v..... 614
Howard v. Flathead Independent Tel. Co..... 197
Hutton, Best Manufacturing Co. v..... 78

Imperial Elevator Co. v. Kelly..... 609
In re Allard Guardianship..... 219
In re Lowe..... 612
In re McDonald 454
In re O'Keefe..... 369
In re Peterson's Estate 96

Jones, Lane v..... 611

Kehoe, State (ex rel. Rowe) v..... 582
Kelly, Imperial Elevator Co. v..... 609
Kemp, State v..... 616
Kerr v. Blaine 602
Kines v. Northern Pacific Ry. Co..... 573
Kirk v. Smith..... 196
Kleinschmidt v. American Mining Co., Ltd..... 7

Lane v. Jones..... 611
Lawlor, State v..... 610
Loeffler v. Dunning..... 177
Lowe, In re..... 612
Lukert v. Eldridge..... 46
Luzon Cafe Co., Hillman v..... 180

McCarthy, Montana Flour Mills Co. v..... 609
McDonald, In re..... 454
McInness v. Republic Coal Co. 112
Meredith v. Roman..... 204
Middlefork Cattle Co. v. Todd..... 259
Miller, State v..... 360
Montana Flour Mills Co. v. McCarthy..... 609
Moon, Wheeler & Motter Merc. Co. v..... 307

Moore Bros. Sheep Co., Riedel v..... 613
Morris State Bank, Gibson, Admx., v..... 60

Nacey, Stephens v..... 230
Northern Pacific Ry. Co. v. Hauswirth..... 135
Northern Pacific Ry. Co., Kimes v..... 573

O'Keefe, In re..... 369
Oregon Short Line R. R. Co., Burles v..... 129
O'Rourke, Sheriff, Pittsmont Copper Co. v..... 281

Parham, Curtis v..... 140
Parchen v. Chessman..... 326
Pentz v. Corscadden 581
Peterson's Estate In re..... 96
Peterson, Blair v..... 615
Pierson v. Daly..... 478
Pittsmont Copper Co. v. O'Rourke, Sheriff..... 281
Plains Light & Water Co., Edwards v..... 535
Prudential Securities Co. v. Three Forks etc. R. Co..... 567

Republic Coal Co., McInness v..... 112
Riedel v. Moore Bros. Sheep Co..... 613
Ritch, State (ex rel. Foster) v..... 155
Roman, Meredith v..... 204
Romney, Cooper v..... 119
Rouleau, Centennial Brewing Co. v..... 490
Rule v. Butori..... 342
Rupp, Hicks v..... 40

Sales, Chesnut v..... 318
Shapard v. City of Missoula..... 269
Smith, Kirk v..... 196
State (ex rel. Carlson) v. District Court..... 611
State (ex rel. Cook) v. District Court..... 615
State (ex rel. Cotter) v. District Court..... 146
State (ex rel. Culbertson Ferry Co.) v. District Court.... 595

State (ex rel. Donlan) v. Board of Commissioners..... 517
State (ex rel. Driscoll) v. District Court.....614, 616
State (ex rel. Duncan) v. District Court..... 614
State (ex rel. Dwyer) v. Duncan, Mayor..... 54
State (ex rel. Foster) v. Ritch..... 155
State (ex rel. Frost) v. Barnett..... 252
State (ex rel. General Electric Co.) v. Alderson..... 29
State (ex rel. Hay) v. Alderson..... 387
State (ex rel. Kehoe) v. Stromme..... 25
State (ex rel. Little) v. District Court..... 158
State (ex rel. Lohman) v. District Court..... 247
State (ex rel. McConnell) v. District Court..... 158
State (ex rel. Metcalf) v. Wileman..... 436
State (ex rel. More) v. District Court..... 577
State (ex rel. Rowe) v. Kehoe..... 582
State (ex rel. Slack) v. District Court..... 610
State (ex rel. Wood) v. Board of Commissioners..... 165
State v. Driscoll..... 558
State v. Groom..... 354
State v. Halk..... 173
State v. Kemp..... 616
State v. Hanson..... 361
State v. Lawlor..... 610
State v. Miller..... 360
Stephens v. Nacey..... 230
Stewart, Dean v..... 506
St. John v. Bank of Montana..... 613
St. Paul F. & M. Ins. Co., Valley Merc. Co. v..... 430
Stromme, State (ex rel. Kehoe) v..... 25
Sutherland v. Green..... 379
Sweet, Duff v..... 610

Thien v. Wiltse..... 189
Thompson, Dubbels v..... 550
Three Forks, etc. R. Co., Prudential Securities Co. v..... 567
Todd, Middlefork Cattle Co. v..... 259
Trogdon v. Hanson..... 1

Valley Merc. Co. v. St. Paul F. & M. Ins. Co..... 430

Welch v. Dean..... 263
Wheeler & Motter Merc. Co. v. Moon..... 307
White v. Chicago, M. & P. S. Ry. Co..... 419
Wileman, State (ex rel. Metcalf) v..... 436
Willoburn Ranch Co. v. Yegen..... 101
Wiltse, Thien v..... 189

Yegen, Willoburn Ranch Co. v..... 101

TABLE OF CASES CITED—VOL. 49.

(For Cases Cited from the Montana Reports, see Table at End of This Volume.)

Abbott v. Land and Water Co., 161 Cal. 42 322
Albany City Savings Inst. v. Burdick, 87 N. Y. 40 339
Alderson v. Bigger's Admr., 4 Munf. (Va.) 528 322
Allen v. Pullman Palace Car Co., 191 U. S. 171 37
Appel Merc. Co. v. Barker, 92 Neb. 669 ..... 312, 317
Armstrong v. City of St. Louis, 69 Mo. 309 352
Arzaga v. Villalba, 85 Cal. 191 132
Ashcroft v. Hammond, 197 N. Y. 488 128
Ashton v. Dashaway Assn., 84 Cal. 61 21
Austin v. Tennessee, 179 U. S. 343 267

Bacon v. Michigan C. Ry. Co., 55 Mich. 224 127
Bailey v. Taaffe, 29 Cal. 423 71
Baltic Min. Co. v. Massachusetts, 231 U. S. 68 ..... 34, 36
Bank of Augusta v. Earle, 13 Pet. 519 35
Barcelon v. Baker, 5 Philippines Rep. 87 462
Barron v. Baltimore, 7 Pet. 243 473
Bassett v. Fairchild, 132 Cal. 637 22
Bain v. Brown, 56 N. Y. 285 262
Beal v. Ray, 17 Ind. 554 593
Beattie v. McMullen, 80 Conn. 160 217
Bigus v. Pacific C. C. Co., 145 Mo. App. 170 435
Billings v. Billings, 110 Mass. 225 228
Blair v. Laflin, 127 Mass. 518 549
Blanc v. Paymaster Min. Co., 95 Cal. 524 295
Blanchard v. Jones, 101 Ind. 542 262
Blankenship v. King County, 68 Wash. 84 201
Block v. Schwartz, 27 Utah, 387 311
Blue v. Capital Nat. Bank, 145 Ind. 518 22
Bolton v. Gilleran, 105 Cal. 244 279
Booth v. Illinois, 184 U. S. 425 313
Bowditsch v. Boston, 101 U. S. 16 464
Bower v. Bower, 5 Wash. 225 99
Bradley v. Bradley, 24 Mo. 311 99
Branch Bank v. Collins, 7 Ala. 95 22
Bridges v. Stephens, 132 Mo. 524 336
Briggs v. Garrett, 111 Pa. 404 128
Briggs v. Hilton, 99 N. Y. 517 386
Briggs v. Sneghan, 45 Ind. 14 598
Brophy v. American Brewing Co., 211 Pa. 596 22
Brown v. Brown, 71 Neb. 200 100
Bryan v. Smith, 10 Mich. 228 500
Buchwald Co. v. Hurst, 111 Md. 572 546
Burns v. Allen, 3 Tenn. 149 99
Butts v. Wood, 37 N. Y. 317 22

California S. & L. Soc. v. Harris, 111 Cal. 133 489
Carpenter v. Hathaway, 87 Cal. 434 385
Carver v. Jones, 45 Ill. 334 474
Castro v. Barry, 79 Cal. 443 44
Ceeder v. H. M. Loud & Sons L. Co., 86 Mich. 541 546

Central Imp. Co. v. Cambria Steel Co., 201 Fed. 811..... 303
Central of Georgia Ry. v. Paul, 93 Fed. 878..... 304
Chace v. Chace, 6 R. I. 407..... 99
Chalmers v. Sheehy, 132 Cal. 459..... 292
Chamberlin v. Morgan, 68 Pa. 168..... 549
Cheeney v. Lafayette etc. Ry. Co., 68 Ill. 570..... 22
Chestnut St. etc. Co. v. Record Pub. Co., 227 Pa. 235..... 546
Chicago etc. Ry. Co. v. Howard, 74 U. S. 392..... 302
Chicago etc. Ry. Co. v. Third Nat. Bank, 134 U. S. 276..... 294
City of Tacoma v. Tacoma L. & W. Co., 17 Wash. 458..... 51
Clairmont v. United States, 225 U. S. 551..... 242
Coffey v. Superior Court, 147 Cal. 525..... 566
Cleman v. McLennon, 78 Kan. 711..... 127
Commerce Exch. Nat. Bank v. Blye, 123 N. Y. 132.....321, 324
Commonwealth v. Shortall, 206 Pa. 165..... 467
Compagnie Francaise etc. v. Louisiana, 186 U. S. 380..... 465
Constitutional Prohibitory Amendment Cases, 24 Kan. 700..... 416
Comstock v. City of Eagle Grove, 133 Iowa, 589..... 280
Cooley v. Board of Wardens, 12 How. 299..... 267
Coulam v. Doull, 4 Utah, 267..... 100
Coulam v. Doull, 133 U. S. 216..... 100
Crackel v. Crackel, 17 Cal. App. 600..... 601
Craig v. Warren, 99 Minn. 246..... 125
Crane v. French, 38 Miss. 503..... 336
Croco v. Hille, 66 Kan. 512..... 511
Cruthers v. Donahue, 85 Conn. 629..... 217
Cunningham v. German I. Bank, 101 Fed. 977..... 545
Cutter v. Demmon, 111 Mass. 474..... 262

Davidson v. Utah Ind. Tel. Co., 34 Utah, 249..... 202
Davis v. United States, 160 U. S. 469..... 176
Dennis v. Maxfield, 10 Allen (Mass.), 138..... 549
Denson v. Stewart, 15 La. Ann. 456..... 262
Devol v. Dye, 6 Ind. App. 257..... 325
Dewalt v. Bartley, 146 Pa. 529..... 442
Dick v. United States, 208 U. S. 340..... 243
Doyle v. Continental Ins. Co., 94 U. S. 535..... 36
Dunham v. Salmon, 130 Wis. 164..... 385

Eagle Iron Works v. Des Moines Ry. Co., 101 Iowa, 289..... 386
Eakins v. American White B. Co., 75 Mich. 568..... 21
East Tennessee etc. Ry. Co. v. Kelly, 17 L. R. A. 691..... 533
East Tennessee etc. Ry. Co. v. Staub, 7 Lea (Tenn.), 397..... 549
Edwards v. Chandler, 14 Mich. 471..... 128
Elwood v. McDill, 105 Iowa, 437..... 384
Ex parte Benedict, Fed. Cas. No. 1292..... 462
Ex parte Bollman, 4 Cranch. 75..... 466
Ex parte Field, 5 Blatchf. 63..... 466
Ex parte Jones, 71 W. Va. 567..... 466
Ex parte Merryman, Taney, 246..... 467
Ex parte Milligan, 4 Wall. 2..... 467
Ex parte Moore, 64 N. C. 802.....462, 466

Factors & T. Ins. Co. v. Murphy, 111 U. S. 738..... 554
Fair v. Citizens' State Bank, 69 Kan. 353..... 325
Farmers' L. & T. Co. v. Missouri etc. Ry. Co., 21 Fed. 264..... 303
Fell v. Northern Pac. Ry. Co., 44 Fed. 248..... 132
First Nat. Bank v. Colonial Hotel Co., 226 Pa. 292..... 546
Fisher v. Dudley, 74 Md. 242..... 440

Fitzpatrick v. Osborns, 50 Minn. 261 385
Foley v. Foley, 120 Cal. 33 600
Franks v. Smith, 142 Ky. 232 ..... 461, 474
Freese v. Pennie, 110 Cal. 467 229
Fuller v. City of Detroit, 97 Mich. 597 352

Gabbert v. Chicago etc. Ry. Co., 171 Mo. 84 404
Gage v. Gage, 29 N. H. 533 99
Gardner v. Tatum, 77 Cal. 458 345
Gaston v. Hayden, 98 Mo. App. 683 228
Gates v. Lane, 49 Cal. 266 482
Gerrish v. Gerrish, 8 Or. 351 99
Gill v. Ruggles, 95 S. C. 90 125
Gilman v. Heitman, 137 Iowa, 336 546
Glassell v. Glassell, 147 Cal. 510 225
Goodwin v. Clover, 91 Minn. 438 504
Gordon v. Brewster, 7 Wis. 309 549
Gray v. Nelson, 77 Iowa, 63 554
Gray v. Pentland, 4 Serg. & R. (Pa.) 420 127
Greene Bay etc. Canal Co. v. Hewitt, 62 Wis. 316 339
Green v. Coos Bay etc. Co., 23 Fed. 67 341
Green v. Weller, 32 Miss. 650 415
Gregg v. Illinois C. Ry. Co., 147 Ill. 550 533
Gregory v. Gregory, 102 Cal. 50 600
Granada Co. Supervisors v. Brown, 112 U. S. 261 38
Grenell v. Detroit Gas Co., 112 Mich. 70 293

Hall v. Vermont etc. Ry. Co., 28 Vt. 401 22
Hammacher v. New Berlin, 124 Wis. 249 201
Hammond v. Clark, 136 Ga. 313 ..... 404, 417
Hammond v. Hopkins, 143 U. S. 224 576
Harmon v. Grant's Pass B. Co., 60 Or. 69 ..... 77 *et seq.*
Hart v. Rush, 1 B. Mon. (Ky.) 166 127
Hart Lumber Co. v. Rucker, 17 Utah, 600 601
Hayes v. Ross, 41 Utah, 580 441
Heisen v. Smith, 138 Cal. 216 411
Herndon v. Salt Lake City, 34 Utah, 65 202
Hewitt v. Young, 82 Iowa, 224 262
Hibernia S. & L. Soc. v. Ordway, 38 Cal. 679 ..... 44, 45
Holder v. Lafayette etc. Ry. Co., 71 Ill. 106 ..... 22, 23
Homestead Min. Co. v. Reynolds, 30 Colo. 330 295
Hooper v. California, 155 U. S. 648 35

Independent H. Dist. v. Ada County, 24 Idaho, 416 157
In re Barnes, 2 Cal., Unrep., 847 376
In re Egan, 5 Blatchf. 319 467
In re Ezeta, 62 Fed. 972 467
In re Garraud's Estate, 35 Cal. 336 100
In re Gaskill, 130 Fed. 235 312
In re Heldt, 98 Cal. 553 600
In re Kemp, 16 Wis. 359 ..... 467, 474
In re Moyer, 35 Colo. 159 461
In re Mutchler, 55 Kan. 164 434
In re Pfahler, 150 Cal. 71 408
In re Schlechter, 63 Fed. 659 267
In re Stebbins' Estate, 94 Mich. 304 100
In re Thompson's Estate, 101 Cal. 349 225
International Text Book Co. v. Pigg, 217 U. S. 91 32

Jacques & Tinsley Co. v. Carstarphen W. Co., 131 Ga. 1.....321, 317
Johnson v. Duncan, 3 Mart. (La.) 530.....467 *et seq.*
Johnson v. Jones, 44 Ill. 142..... 474
Jones v. Chalfant, 3 Cal. Unrep. 585..... 345
Jones v. Sizemore, 25 Ky. Law Rep. 1957..... 588

Kehrer v. Stewart, 197 U. S. 60..... 37
Kelley v. Fond du Lac, 31 Wis. 179.....201, 202
Kellogg v. Dickinson, 147 Mass. 432..... 341
Kelly v. Hart, 14 Vt. 50..... 606
Kerfoot v. Hyman, 52 Ill. 512..... 262
Kerns v. Graves, 26 Cal. 156..... 482
Kidd v. Pearson, 128 U. S. 1..... 464
Kidd, Dates & Price Co. v. Musselman G. Co., 217 U. S. 461..... 313
Kilpatrick v. Penrose Ferry B. Co., 49 Pa. 118..... 21
Kilmer v. Smith, 77 N. Y. 226..... 339
Kingman v. Watson, 97 Wis. 596..... 92
Kreuzberger v. Wingfield, 96 Cal. 251..... 385
Koehler v. Hill, 60 Iowa, 543..... 404
Kohn v. Fishbach, 36 Wash. 69..... 317

Larson v. Dutiel, 14 S. D. 476..... 77
Lawe v. City of Kaukauna, 70 Wis. 306..... 352
Lawton v. Steele, 152 U. S. 133..... 464
Lemieux v. Young, 211 U. S. 489..... 313
Light v. Richardson, 3 Cal. Unrep. 745..... 213
Lobaugh v. Cook, 127 Iowa, 181.....404, 407
Lorieux v. Keller, 5 Iowa, 196..... 100
Loughlin v. U. S. School F. Co., 118 Ill. App. 36..... 293
Louisville T. Co. v. Louisville etc. Ry. Co., 174 U. S. 674..... 303
Love & Co. v. Ross, 89 Iowa, 400..... 385
Lowry v. Dubose, 2 Bail. (S. C.) 425..... 336
Ludwig v. Western Union Tel. Co., 216 U. S. 146..... 32
Luedecke v. Des Moines C. Co., 140 Iowa, 223..... 304
Luther v. Borden, 5 Works, 240..... 467
Luther v. Borden, 7 How. 1..... 461
Lynch v. Murphy, 119 Mo. 163..... 405
Lyndon S. Bank v. International Co., 78 Vt. 169.....336, 337

MacVeagh & Co. v. Atchison etc. Co., 3 N. M. 205..... 533
Maginn v. Lancaster, 100 Mo. App. 116..... 588
Marshall v. Grimes, 41 Miss. 27..... 38
Marshall v. Taylor, 97 Cal. 422..... 345
Marshall v. Thompson, 39 Minn. 137..... 77
Martin v. Mott, 12 Wheat. 19..... 461
Martin v. Santa Cruz etc. Co., 4 Ariz. 171..... 22
Massillon etc. Co. v. Schirmer (Ia.), 93 N. W. 599..... 92
Mayor etc. v. Fitzpatrick, 36 N. J. Law, 120..... 352
McCall v. McDowell, 1 Abb. (U. S.) 212..... 467
McCarty v. Clark County, 101 Mo. 179..... 352
McConnell v. Hampton, 12 Johns. (N. Y.) 243..... 471
McCourt v. People, 64 N. Y. 583..... 434
McCrory v. Little, 136 Ind. 86..... 554
McDaniels v. Connelly Shoe Co., 30 Wash. 549..... 312
McIntosh v. Hodges, 110 Mich. 319..... 504
McIntyre v. McBean, 13 U. C. Q. B. 534..... 128
McKinster v. Sager, 136 Ind. 671..... 312
McMullan v. Dickinson Co., 60 Minn. 156..... 549
McNutt v. Dix, 83 Mich. 328..... 262

Miller v. Crawford, 70 Ohio St. 207..... 311
Miller v. Pennoyer, 23 Or. 364..... 440
Miller v. United States, 11 Wall. 268..... 475
Mills v. Bennett, 94 Tenn. 651..... 336
Mitchell v. Clark, 110 U. S. 633..... 473
Monongahela City v. Fisher, 111 Pa. 9..... 201
Montgomery W. Co. v. Dienelt, 133 Pa. 585..... 305
Moon v. Evans' Estate, 69 Wis. 667..... 100
Moore v. Copp, 119 Cal. 429..... 339
Moore v. Taylor, 2 Tenn. Ch. App. 556..... 336
Moreing v. Weber, 3 Cal. App. 14..... 217
Murray v. Buell, 74 Wis. 14..... 71
Musselman Gricer Co. v. Kidd, D., etc. Co., 151 Mich. 478..... 312
Moulton v. Scully (Me.), 89 Atl. 944..... 566
Missouri etc. Ry. Co. v. Roberts, 152 U. S. 114.....241, 242
Moxley v. Ragan, 10 Bush (Ky.), 156..... 336
Moyer v. Peabody, 212 U. S. 78.....461, 466
Moyer v. Peabody, 148 Fed. 870.....461, 465
Mugler v. Kansas, 123 U. S. 623..... 464
Mulvane v. O'Brien, 58 Kan. 463..... 262
Murray v. Hoboken L. & I. Co., 18 How. 272..... 465
Murphy v. Russell & Co., 8 Idaho, 133.....92, 94
Mutual L. Ins. Co. v. United States etc. Co., 82 Misc. Rep. 632..... 336
Myers v. Longstaff, 14 S. D. 98..... 127

National Loan & I. Co. v. Rockland Co., 94 Fed. 335..... 22
National St. Bank v. Sandford etc. Co., 157 Ind. 10..... 546
Nave v. Powell, 52 Ind. App. 496..... 384
Neas v. Borches, 109 Tenn. 398..... 312
Nelson v. City of Spokane, 45 Wash. 31..... 201
Nelson v. Northern Pac. Ry. Co., 188 U. S. 108..... 575
New York etc. R. Co. v. Ketchum, 27 Conn. 170..... 22
Nichols, Shepard Co. v. Rhoadman, 112 Mo. App. 299..... 93
Nickolls v. Barnes, 32 Neb. 195..... 504
Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482.....293. 303
Northern Pac. Ry. Co. v. Boyd,, 177 Fed. 804..... 303
North Chicago R. Co. v. Williams, 140 Ill. 275..... 132

Off & Co. v. Morehead, 235 Ill. 40..... 311
Ormsby v. Louisville, 79 Ky. 197..... 411
Osborn v. Leach, 135 N. C. 628..... 126

Palmer v. Hartford Ins. Co., 54 Conn. 488..... 339
Paul v. Virginia, 8 Wall. 168..... 35
Paxton etc. Co. v. Farmers' etc. Co., 45 Neb. 884..... 276
Payne v. Hodgson, 34 Utah, 269..... 440
People v. Armstrong, 2 Idaho, 298..... 357
People v. Brown, 105 Cal. 66..... 434
People v. Cowles, 13 N. Y. 350..... 593
People v. Prevost (Colo.), 134 Pac. 129..... 404
People v. Sours, 31 Colo. 369..... 418
People ex rel. Eakins v. Roosevelt, 44 N. Y. Supp. 1003..... 566
People ex rel. Grinnell v. Thompson, 116 Ill. 587..... 441
People ex rel. Lynch v. Budd, 114 Cal. 168..... 592
People ex rel. McKune v. Weller, 11 Cal. 49.....592 *et seq.*
People ex rel. Schnackenberg v. Czarnecki, 256 Ill. 320..... 439 *et seq.*
People ex rel. Speed v. Hartwell, 12 Mich. 508..... 593
People ex rel. Woods v. Crissey, 91 N. Y. 616..... 588
Perkins v. Cooper, 24 Pac. 377..... 194

Pfeiffer v. Lansberg B. Co., 44 Mo. App. 59 22
Phillips v. Southern R. Co., 124 N. C. 123 132
Pierce v. Tennessee C., I. & R. Co., 173 U. S. 1 549
Press Co. v. Stewart, 119 Pa. 584 127
Prize Cases, 2 Black (U. S.), 635 474
Pullman Co. v. Adams, 189 U. S. 420 37
Pullman Co. v. Kansas, 216 U. S. 56 32

Quick v. Corlies, 39 N. J. L. 11 ..... 336, 337
Quinn v. Review Pub. Co., 55 Wash. 69 125

Remelee v. Hall, 31 Vt. 582 549
Riddlesbarger v. Hartford Ins. Co., 7 Wall. (U. S.) 389 336
Riglesberger v. Bailey, 102 Ky. 608 601
Rogers v. Vail, 16 Vt. 327 606
Rooker v. Bruce, 171 Ind. 86 601
Root v. Bingham, 26 S. D. 118 71
Rose v. Himely, 4 Cranch, 241 475
Russell v. Murdock, 79 Iowa, 101 93

Saling v. Bolander, 125 Fed. 701 325
San Francisco etc. Co. v. Bell, 48 Cal. 398 293
San Jose Imp. Co. v. Auzerais, 106 Cal. 498 279
Santissima Trinidad, 7 Wheat. 283 476
Savings etc. Soc. v. Meeks, 66 Cal. 371 600
Sawyer v. Cargile, 72 Ga. 290 411
Sawyer v. Haydon, 1 Nev. 75 592
Scammon v. Chicago, 40 Ill. 146 411
Schieb v. Thompson, 23 Utah, 564 225
Schneider v. Patton, 175 Mo. 684 295
Schoelkopf v. Leonard, 8 Colo. 159 262
Schomberg v. Walker, 132 Cal. 224 126
Schultz v. Schultz, 19 N. D. 688 100
Schultze v. State, 43 Md. 295 482
Schwed v. Hartwitz, 23 Colo. 187 411
Scott v. Vulcan I. W. Co., 31 Okl. 334 93
Scougale v. Sweet, 124 Mich. 311 566
Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246 36
Sentell v. New Orleans etc. R. Co., 166 U. S. 698 465
Sewall v. City of St. Paul, 20 Minn. 511 411
Shapley v. Abbott, 42 N. Y. 443 ..... 336, 341
Shaw v. Williams, 87 Ind. 158 411
Sheean v. Jones, 44 Ill. 167 474
Silbar v. Ryder, 63 Wis. 106 339
Silverton Min. Co. v. Haughwout, 44 Colo. 173 22
Simpson v. First Nat. Bank, 93 Fed. 309 77
Simpson v. Osborn, 52 Kan. 328 440
Smelser v. Pugh, 29 Ind. App. 614 339
Smith v. City of Buffalo, 159 N. Y. 427 280
Smith v. Gillette, 59 Tex. 86 336
Smith v. Herd, 110 Ky. 56 336
Smith v. Shaw, 12 Johns. (N. Y.) 257 470
Smith v. State (Tex. Cr. App.), 146 S. W. 547 435
Smith v. Youmans, 3 Hill (S. C.), 85 127
Snyder v. Rosenbaum, 215 U. S. 261 144
Snyder v. Stribling, 18 Okl. 205 144
South Florida C. L. Co. v. Waldin, 61 Fla. 766 546
Spalding v. Chandler, 160 U. S. 394 ..... 241, 242
Sparhawk v. Sparhawk, 114 Mass. 356 228

Spear v. Lomax, 42 Ala. 576..... 500
Spurr v. Travis, 145 Mich. 721..... 312
Squire & Co. v. Tellier, 185 Mass. 18..... 312
Standard L. Co. v. Miller, etc. L. Co., 21 Okl. 624..... 144
State ex rel. Bateman v. Bode, 55 Ohio St. 224..... 441
State ex rel. Fisk v. Porter, 13 N. D. 406..... 442
State ex rel. Horsley v. Carbon County, 38 Utah, 563..... 157
State ex rel. Runge v. Anderson, 100 Wis. 523..... 442
State ex rel. Sampson v. Superior Court, 71 Wash. 484.....593, 594
State ex rel. Shepard v. Superior Court, 60 Wash. 370..... 442
State ex rel. Watson v. Cobb, 2 Kan. 32..... 588
State v. Brown, 71 W. Va. 519..... 466
State v. Herried, 10 S. D. 109.....404, 407
State v. Mason, 43 La. Ann. 590..... 404
State v. Shepherd, 63 Kan. 545..... 434
State v. Sheridan, 14 Idaho, 222..... 125
State v. Snyder, 66 Tex. 687..... 46
State v. Timme, 54 Wis. 318.....404, 406
State Loan etc. Co. v. Cochran, 130 Cal. 245..... 336
State Trust Co. v. Sheldon, 68 Vt. 259..... 337
St. Clair v. Rutledge, 115 Wis. 583..... 546
St. Louis etc. R. Co. v. O'Hara, 177 Ill. 525..... 22
St. Louis Trust Co. v. Des Moines etc. Ry. Co., 101 Fed. 632..... 304
Story v. Gammell, 68 Neb. 709..... 339
Strong v. City of Brooklyn, 68 N. Y. 1..... 352
Strunk v. Smith, 8 S. D. 407..... 144
Sutherland v. Wyer, 67 Me. 64..... 549
Sutphen v. Cushman, 35 Ill. 186.....77, 78
Sykes v. Mayor, 55 Miss. 115..... 38

Talamo v. Spitzmiller, 120 N. Y. 37..... 504
Taussig v. St. Louis etc. R. Co., 166 Mo. 28..... 22
Taylor v. Glenn Falls Ins. Co., 44 Fla. 273..... 339
Taylor v. Reynolds, 53 Cal. 686..... 489
Thomas v. Southern Ry. Co., 122 N. C. 1005..... 131
Thorpe v. Pennock Merc. Co., 99 Minn. 22..... 312
Todd v. Election Commrs., 104 Mich. 474..... 442
Tourtelot v. Whithed, 9 N. D. 467..... 546
Town of Hayward v. Pimental, 107 Cal. 386..... 482
Trask v. Weeks, 81 Me. 325..... 336
Travelers' Indemnity Co. v. Fawkes, 120 Minn. 353..... 435
Tyler Estate v. Hoffman, 146 Mo. App. 510..... 546

Union C. Life Ins. Co. v. Spinks, 119 Ky. 261..... 336
United States v. 43 Gallons of Whisky, 93 U. S. 188..... 243
United States v. Ju Toy, 198 U. S. 253..... 465
United States v. Trans-Missouri etc. Assn., 166 U. S. 290..... 334

Van Horne v. Treadwell, 164 Cal. 620..... 322
Vidal v. Philadelphia, 2 How. (U. S.) 127..... 334

Wales-Riggs Plantations v. Caston, 105 Ark. 641..... 546
Walp v. Mooar, 76 Conn. 515..... 312
Washington Ice Co. v. Webster, 125 U. S. 426..... 325
Waterman v. Banks, 144 U. S. 394..... 144
Waters-Pierce Oil Co. v. Texas, 177 U. S. 28..... 36
Weir v. Washoe H. & S. Co., 31 Nev. 528..... 212
Wells Fargo & Co. v. Enright, 127 Cal. 669..... 336
Western Union Tel. Co. v. Cuall Pub. Co., 181 U. S. 92..... 267

Western Union Tel. Co. v. Kansas, 216 U. S. 1.....32, 34
Western Twine Co. v. Wright, 11 S. D. 521..... 386
Whittemore v. Russell, 80 Me. 297..... 100
Williams v. Bank, 15 Okl. 477..... 312
Williams v. Carolina etc. R. Co., 144 N. C. 498..... 132
Williams v. Phelps, 16 Wis. 80..... 325
Williams v. Vanderbilt, 28 N. Y. 217..... 134
Wilson v. Fosket, 6 Met. (Mass.) 400.....99, 100
Wilson v. New Orleans etc. R. Co., 63 Miss. 352..... 132
Wofford v. Meeks, 129 Ala. 349.....125, 126
Wood v. Lost Lake etc. Co., 23 Or. 20..... 21
Woodward v. Emmons, 61 N. J. L. 281..... 92
Worcester Nat. Bank v. Cheeney, 87 Ill. 602..... 554
Worley v. Spreckles Bros. Com. Co., 163 Cal. 60..... 212
Wright v. Gardner, 98 Ky. 454..... 336
Wright v. Hart, 182 N. Y. 330..... 311

Yeiser v. Russell & Co., 26 Ky. Law Rep. 1151..... 93
Young v. Borzone, 26 Wash. 4:..... 217
Young v. Lemieux, 79 Conn. 434..... 312
Young v. Remer, 4 Barb. 442..... 482
Younger v. Moore, 8 Cal. App. 237..... 601

SUPREME COURT RULES.

For Rules of the Supreme Court of the State of Montana, see 44 Mont. xxv.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1914.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,
THE HON. SYDNEY SANNER,
} Associate Justices.

TROGDON, RESPONDENT, *v.* HANSON SHEEP CO., APPELLANT.

(No. 3,357.)

(Submitted February 11, 1914. Decided March 18, 1914.)

[139 Pac. 792.]

Work and Labor—Quantum Meruit—Corporations—Instructions—Assumption of Fact—Opinion Evidence—Admissibility—Briefs—Assignments of Error—Waiver—Offer of Proof.

Appeal and Error—Assignments of Error—Waiver.

1. Specifications of error not argued in appellant's brief will be deemed waived or abandoned.

Same—Evidence—Exceptions.

2. Error in rulings on the admission of evidence, to which no exceptions were saved, will not be considered on appeal.

Same—Offer of Proof—When Necessary.

3. Where an objection to evidence is sustained and it is not apparent what the answer of the witness would be, an offer of proof is necessary to entitle appellant to a review of the ruling.

Opinion Evidence—Admissibility.

4. To make expert testimony admissible it is not necessary that the witness must know the actual facts respecting the subject under consideration; he may base his opinion upon an assumed state of facts.

Work and Labor—*Quantum Meruit*—Corporations—Evidence—Admissibility.

5. Where labor has been performed for a corporation with the knowledge of its directors and officers and without objection on their part, it is liable on a *quantum meruit*, in the absence of an express contract under which it was performed; and evidence which brings home to such officers knowledge of the fact that plaintiff expected pay is admissible.

[As to authority of general manager or agent of corporation to hire employees, see note in Ann. Cas. 1914B, 831.]

Same—Instructions—Assumption of Fact—Proper Refusal.

6. Where, in an action by a married woman against a corporation for services rendered by her, the question whether her husband was her agent in her dealings with defendant was in issue, a requested instruction which assumed such to have been a fact was properly refused.

Appeal and Error—Verdict—Conclusiveness.

7. The fact that on the evidence as presented to the appellate court it might have made a different finding is not sufficient to warrant disturbing a verdict which has been approved by the trial court in denying a new trial.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by Effie Trogdon against the Hanson Sheep Company, a corporation. From a judgment for plaintiff, and an order denying it a new trial, defendant appeals. Affirmed.

Messrs. Loud, Collins, Brown, Campbell & Wood, for Appellant, submitted a brief; *Mr. Chas. S. Loud* argued the cause orally.

Mr. M. J. Lamb and *Mr. W. R. Swank,* for Respondent, submitted a brief, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

For some time prior to October 1, 1907, A. S. Hanson was engaged in the sheep business in Yellowstone county. Nathan Trogdon was his foreman, and Trogdon's wife, this plaintiff, cooked for the men employed. The two received as wages $75 per month and the living for their family. In July, 1907, Hanson and Trogdon entered into a contract by which Trogdon was to purchase a one-third interest in the business and continue as foreman at $75 per month. Nothing was said in the agree-

ment about Mrs. Trogdon. The contract never went into effect, however, for a corporation—this defendant—was organized, which took over the business. Trogdon became the owner of one-third of the capital stock, and was made the secretary-treasurer of the company. Hanson and his wife owned the remainder of the stock. Hanson was elected president, and Mrs. Hanson vice-president. There was never but one meeting of the stockholders or directors held, and Mrs. Trogdon was not present at that time, and, so far as the record discloses, knew little, if anything, of what transpired. Trogdon was given a check-book, and for more than three years acted as foreman, employing, paying and discharging the help, and drawing for himself $75 per month. The contention of the plaintiff is that, about the time the corporation was organized, she had conversations with her husband and Mr. Hanson, in which she informed them that, if she worked for the company, she would expect compensation to herself, and that she was promised wages by them. The contention of the defendant is that Trogdon and his wife were to continue working for the company under the same arrangement which prevailed while they worked for Hanson, and that the $75 per month paid to Trogdon, together with the living for his family, constituted the compensation for both. After something more than four years had elapsed, Mrs. Trogdon demanded payment for the services which she had rendered to the company, and, when this was refused, she instituted this action by filing a complaint which counts upon a *quantum meruit* and also upon an express contract. The answer is a general denial and also an affirmative plea of payment. By an appropriate instruction, the trial court withdrew from the jury consideration of the second count of the complaint, and the cause was submitted on the *quantum meruit* count alone, resulting in a verdict and judgment for the plaintiff. The defendant has appealed from the judgment and from an order denying it a new trial.

There are eighteen specifications of error in appellant's brief, [1] but, of these, 9, 11, and 15 are not argued, and will be

treated as waived or abandoned. (*Mette & Kanne Distilling Co.* v. *Lowrey*, 39 Mont. 124, 101 Pac. 966; *Watkins* v. *Watkins*, 39 Mont. 367, 102 Pac. 860; *Nelson* v. *Boston & Mont. etc. Silver Min. Co.*, 35 Mont. 223, 88 Pac. 785.) Specifications 5, 6, and 11 relate to rulings of the trial court upon the admission of evidence, but the record fails to disclose that any exception was [2] saved in any one of these instances, and appellant will be deemed to have acquiesced in the decisions. (*State* v. *Tudor*, 47 Mont. 185, 131 Pac. 632; *State* v. *Biggs*, 45 Mont. 400, 123 Pac. 410; *Gehlert* v. *Quinn*, 35 Mont. 451, 119 Am. St. Rep. 864, 90 Pac. 168.) Specifications 2, 3, and 4 challenge rulings of the trial court in admitting evidence tending to show authority in Nathan Trogdon to employ his wife and to charge the company for her wages. In limiting the jury to a consideration of the first count of plaintiff's complaint, the trial court specifically withdrew all of this evidence, so that no possible prejudice could have resulted, if any error occurred.

While a witness for the defendant, A. S. Hanson testified concerning the payment of $30 to this plaintiff, gave his version of the transaction, and stated that the amount was charged to Nathan Trogdon's account. He was then asked if he had the book of original entry, but an objection to the question was sustained, and error is predicated upon the ruling. There was [3] not any offer of proof made, and it is impossible for us to determine whether any error was committed. We cannot tell whether the witness would have answered in the affirmative or negative; and this emphasizes the reason for the rule which has been repeated by this court so often, *viz.:* Where an objection to evidence is sustained, and the answer of the witness is not apparent, an offer of proof is necessary to enable the supreme court to review the ruling. (*Tague* v. *John Caplice Co.*, 28 Mont. 51, 72 Pac. 297; *Frederick* v. *Hale*, 42 Mont. 153, 112 Pac. 70; *Taylor* v. *Malta Merc. Co.*, 47 Mont. 342, 132 Pac. 549.)

A witness, Robinson, was called as an expert to give an opinion as to the value of the services which it is alleged Mrs. Trogdon rendered to the defendant company. The witness had

[4] been present in the courtroom, and had heard Mr. and Mrs. Trogdon describe the work for which the plaintiff is seeking compensation. On cross-examination, he was asked whether he knew what services Mrs. Trogdon actually rendered the company, but, upon objection, he was not permitted to answer. The ruling is so clearly correct that we wonder at counsel's contention. An expert is not required to know the actual facts respecting the subject under consideration. He may base his opinion, not upon facts, but upon an assumed state of facts. In this instance, counsel for plaintiff might properly have recited to the witness the plaintiff's contention as to the work she had done, so far as disclosed by the evidence, and upon that might have asked for the opinion of the witness. The same purpose was served by having the witness give his opinion upon what he had heard Mr. and Mrs. Trogdon say from the witness-stand. There was no objection that the witness was not shown to be competent to give an opinion, and plaintiff was entitled to show the reasonable value of her services under the *quantum meruit* count of her complaint.

Error is predicated upon the ruling of the trial court admitting in evidence the contract entered into between Hanson and Trogdon in July, 1907. Upon his direct examination, Hanson testified that it was understood that Mr. and Mrs. Trogdon should continue for the company under the same arrangement as they had with him individually. Upon cross-examination, he was asked, in effect, whether the written agreement of July, 1907, represented that arrangement, and when he testified that it did, the contract was properly admitted to show that it made no provision whatever for Mrs. Trogdon's work. It is immaterial that the contract never was in effect. If it correctly represented the arrangement prevailing at the time the corporation was organized, it was competent to go to the jury for what it was worth.

Complaint is made that plaintiff was permitted to testify that she told her husband of a conversation she had with Mr. [5] Hanson in which she demanded compensation for her work,

and in which he assured her that she should receive it. Independently of whether the evidence introduced was sufficient to show authority in Trogdon to employ his wife and bind the company for her wages, this particular evidence was admissible to sustain the theory upon which the case was submitted. It brought home to the directors and officers of the company, of which the plaintiff's husband was one, knowledge of the fact that the plaintiff was expecting wages for whatever work she performed for the company. It is her contention that it was with this knowledge that they permitted her to continue her work without objection upon their part. The rule of law is tersely stated as follows: "Where labor has been performed for a corporation with the knowledge of the directors and general manager, and without any dissent on their part, the corporation will be bound to pay a *quantum meruit,* in the absence of any express contract under which the labor was performed." (10 Cyc. 1034; 3 Thompson on Corporations, sec. 2152.) Having shown that she rendered services to the company with the expectation of receiving pay, and with the knowledge and acquiescence, at least, of its officers, plaintiff made out a *prima facie* case for compensation. Whether her husband was her agent was a question in issue. Our Code declares that "all work and labor performed by a married woman for a person other than her husband and children shall, unless there is a written agreement on her part to the contrary, be presumed to be performed on her separate account." (Rev. Codes, sec. 3705.)

Instruction No. 5, offered by the defendant, was properly refused. It was erroneous because it would have precluded the plaintiff from recovering upon a *quantum meruit* (*Blankenship* v. *Decker,* 34 Mont. 292, 85 Pac. 1035), and because it assumed that Trogdon was the agent of his wife. It was for the jury [6] to say whether Hanson's version of his conversation with Mrs. Trogdon was or was not correct. It is always error for the trial court to assume a material fact which is in dispute. (*Ferris* v. *McNally,* 45 Mont. 20, 121 Pac. 889; *Allen* v. *Bear*

Creek Coal Co., 43 Mont. 269, 115 Pac. 673; *Stephens* v. *Elliott*, 36 Mont. 92, 92 Pac. 45.)

The evidence in support of plaintiff's contention, as it appears from the printed record, is unsatisfactory, and, if called upon [7] to determine its weight in the first instance, we might reach a different conclusion from that represented by the verdict. But the jurors, in passing upon it, and the trial court, in reviewing it upon the motion for a new trial, enjoyed the advantage over the members of this court that they had seen the witnesses, heard them give their testimony, observed their demeanor while testifying, and were in a much better position to judge of their credibility than are we. For this reason, we do not feel justified in interfering with their conclusion.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

KLEINSCHMIDT ET AL., RESPONDENTS, *v.* AMERICAN MINING CO., LTD., ET AL., APPELLANTS.

(No. 3,343.)

(Submitted February 13, 1914. Decided March 19, 1914.)

[139 Pac. 785.]

Corporations — Directors and Officers — Misappropriation of Funds—Compensation for Past Services—Minority Stockholders—Demand for Redress—When Unnecessary—Void Acts —Ratification.

Corporations—Minority Stockholders—Demand on Directors—When Unnecessary.

1. Where the board of directors of a corporation was completely dominated by one of their number, its acting secretary, a demand upon the board was not a prerequisite to an action by minority stockholders to recover money alleged to have been misappppropriated by him with the consent of the board, the law not requiring the doing of a useless thing.

[As to actions by stockholders on behalf of the corporation, see note in 97 Am. St. Rep. 29.]

Same—Parties.

2. Where minority stockholders sue the secretary to compel the repayment of money misappropriated, the corporation is a necessary party, the action being prosecuted for its benefit.

Same—Officers and Agents—Misappropriation of Funds.

3. The right of minority stockholders to require the officers, to whom has been intrusted the control of the affairs of the corporation, to account for money and funds misappropriated by them, does not depend upon whether the corporation is insolvent or likely to become so; hence omission to allege insolvency was immaterial.

Same—Directors—Breach of Trust—What Constitutes.

4. The directors of a corporation, being agents and trustees of the stockholders, must exercise good faith in the administration of their trust, and, though not liable for losses resulting from mere errors of judgment, cannot divert the assets to purposes foreign to the scope of their powers, nor so direct its affairs, even when acting within their powers, as to gain an unfair advantage or profit to themselves; their action in either event being a violation of their trust.

Same—Premature Appeal.

5. Where the decree in an action by minority stockholders indicated that a receiver would be appointed to hold and make disposition of moneys found to have been misappropriated by the secretary of a corporation, but the appointment had not been made at the time of taking an appeal, appellant's contention that the facts alleged were insufficient to warrant the appointment of such an officer was premature.

Same—Voting Salary to Director—Source of Power.

6. A board of directors of a corporation has not the inherent power to vote a salary to a director; the power so to do must emanate from the stockholders, or the statute, or the by-laws legally enacted.

Same—Directors—Compensation for Past Services.

7. Directors of a corporation cannot legally vote themselves compensation for past services.

[As to right of corporate officers to compensation, see note in 136 Am. St. Rep. 909.]

Same—Misappropriation of Corporate Funds.

8. Where a director of a corporation voluntarily or by the direction of the board assumes to perform the duties of secretary or treasurer without prearrangement by resolution, or by-laws, or by contract for compensation, he is not entitled to recover on a *quantum meruit* for past services, and any expenditure made by the board for such services is a misappropriation of the company's funds.

Same—Compensation for Past Services—Ratification.

9. Where the board of directors of a corporation had adopted by-laws providing for the appointment of a secretary but had never fixed a compensation for his services, and the duties of that office had for years been performed by one of their number without compensation, his successor, also a director, who voluntarily assumed to act as secretary with the consent of the directors and who continued as such for about five years without making a claim for remuneration, was not entitled to any for services thus performed, and the board was without power to ratify his withdrawal of funds in payment thereof.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Ellen Kleinschmidt and others, minority stockholders, brought in behalf of the corporation, American Mining Company, Limited, against R. H. Kleinschmidt and others. From a decree for plaintiffs and an order denying them a new trial, defendants appeal. Affirmed.

STATEMENT OF THE CASE BY THE JUSTICE DELIVERING THE OPINION.

The plaintiffs, who are minority stockholders of the defendant, the American Mining Company, Limited (hereinafter referred to as the company), brought this action to compel defendant R. H. Kleinschmidt, one of the directors and acting secretary of the company, to account to it for certain of its moneys which, it is alleged, he had, by the consent of the other defendants, also directors, misappropriated to his own use under the guise of salary as secretary, and for other purposes not authorized by law or the by-laws of the company; to obtain an injunction restraining the defendant directors from auditing or allowing any further claim by this defendant against the company on account of salary, and restraining said defendant from appropriating any of the funds of the company to the payment of any claim for salary; to obtain the appointment of a receiver to take charge of the funds and property of the company and administer the same; to compel the president and secretary to transfer to the plaintiff Ellen Kleinschmidt upon the books of the company certain shares of stock acquired by her by purchase; and to recover the costs of this action, including counsel fees. Plaintiffs also pray for general relief. The circumstances out of which the controversy grew, so far as it is necessary to state them, are the following:

The company was organized under the Compiled Statutes of 1887, for the purpose of conducting the business of mining, its properties being situated in Montana and Idaho. The capital stock consists of 500,000 shares of the par value of $1 each. There were issued to the plaintiffs and the defendants shares to the amounts following: To Ellen Kleinschmidt, 230,700; to

Albert Kleinschmidt, 250; to R. A. Kleinschmidt, 250; to defendant R. H. Kleinschmidt, 114,500; to Amelia H. Kleinschmidt, 115,500; to Louis Hillebrecht, Maria Kuphal and Julia M. Mau, each 500 shares—the aggregate issue being 462,700 shares. The company was organized by Albert Kleinschmidt and R. H. Kleinschmidt, brothers, under an agreement that the shares should be held in equal amounts by them and other persons designated by each of them to hold for their respective uses. The shares were issued in consideration of property conveyed to the company by the brothers, and the distribution of them was made as above stated, the plaintiffs holding in the interest of Albert, and the defendants in the interest of R. H. Kleinschmidt. The plaintiffs Ellen and R. A. Kleinschmidt are the wife and son of Albert. The defendant Amelia H. Kleinschmidt is the wife of R. H. Kleinschmidt; Julia M. Mau is her sister. Maria Kuphal is the cousin of R. H. Kleinschmidt, and is a member of his family. The wife of defendant Louis Hillebrecht is closely related by blood to Amelia H. Kleinschmidt, and R. H. Kleinschmidt and Louis Hillebrecht have been associated in business. During the year 1898 dissensions arose between the brothers which gradually grew into extreme hostility, so that they have since rarely spoken to each other or transacted any business with each other. Even when engaged in the transaction of business their intercourse has been characterized by expressions of hate and recrimination. They have rarely agreed in matters pertaining to business of the company. The wife and son of Albert, both as stockholders and directors, when either of them happened to be a director, have always voted in accordance with his views, while the four defendants, other than R. H. Kleinschmidt, have always voted in accordance with his views. Julia M. Mau resides in San Francisco, California, and has never attended a stockholders' or directors' meeting, invariably committing her right to vote in either capacity to R. H. Kleinschmidt by proxy. This defendant is of a violent, domineering disposition, and his codefendants have never opposed his wishes. By the distribution and ownership of the shares of stock as

above stated, he owns or controls a bare majority thereof. He nevertheless so uses it at all stockholders' meetings as to elect himself a director and to secure the election of two or more of his codefendants (the board of directors consisting of five members), with the purpose of retaining control of the board; and since the year 1898 he has dominated and controlled all the affairs of the company, except in transactions which have required the approval of more than a majority of the stockholders. From the date of the organization of the company until the year 1898, the plaintiff Albert Kleinschmidt had been its president and had performed the duties of secretary. These duties were performed without compensation, none of them being arduous, extensive or requiring technical skill. At the beginning of that year the defendant R. H. Kleinschmidt had himself elected secretary and treasurer of the company, and has since held these positions. Louis Hillebrecht was then elected president, and held the office up to the time of this action.

No action was ever taken by the board of directors concerning the salary of the secretary or treasurer until on or about September 5, 1904. At that time R. H. Kleinschmidt caused to be incorporated in the minutes of the proceedings of the board of directors an entry, in substance, as follows: "R. H. Kleinschmidt, secretary and manager, presented his claim for the amount due him for salary and office expenses from the date of his election, January 5, 1898, to July 5, 1904. He announced that he had theretofore, with the consent of the directors, applied sums aggregating $4,200 upon the amount due him; the item so appropriated being embraced in the statement of receipts and expenditures of the company then submitted. It was thereupon ordered by unanimous vote of the directors, except R. H. Kleinschmidt, who did not vote, that the application of $4,200 to the said claim having been made with the consent and full knowledge of the directors, be approved and the further consideration of the claim be postponed until another meeting. The said Kleinschmidt did not participate in the proceeding touching the statement of receipts and disbursements, nor those relating

to his claim." Of the amount so appropriated there had been withdrawn from the bank account of the company on July 3, 1903, $2,100, and on July 6, 1903, $2,100. Thereafter, and for the same purpose, on September 6, 1904, there was withdrawn and appropriated to the same purpose the further sum of $1,400, and on October 26, 1904, the sum of $2,100. On February 4, 1906, the board disposed of the claim for salary by fixing the amount at $300 per month, to date from January 5, 1898, and the withdrawals made on September 6, and October 26, 1904, were approved.

Subsequent to the beginning of the year 1898 the operations of the company had been confined to an effort to close out its business by the sale of its properties and the distribution of the proceeds. From time to time it executed leases and bonds on certain of them. These all provided that such sums as were realized from sales, royalties or otherwise were to be deposited in the American National Bank at Helena, to be paid out by the bank to the stockholders without further action by the board of directors. Under an arrangement made between Albert and R. H. Kleinschmidt, understood by the bank authorities, these funds could not be withdrawn from the bank except upon check signed by both. No sales of any of the claims of the company were effected; but from royalties and forfeited payments, made under bonds for sales and from sales of ore extracted by lessees under forfeited bonds and leases, large sums were realized, and, being paid to the bank, were distributed by it to the stockholders. This arrangement between the brothers was carried out until, for some reason not apparent, unless it is to be accounted for by the growing enmity between them and R. H. Kleinschmidt and his associates desired exclusive control of the funds of the company, the board of directors authorized a discontinuance of it. The deposits were then made in another bank, subject to withdrawal without the consent of Albert Kleinschmidt. No dividends were thereafter paid to the stockholders, though considerable sums were realized from sales of ore left upon the dumps at the mines by different lessees. All disbursements of

moneys have since been made upon the check of R. H. Kleinschmidt alone. The minutes of the meetings of directors and stockholders have been reasonably well kept by R. H. Kleinschmidt, or the attorney employed by him for the company. No books of account, however, have been kept, the only record made of receipts and disbursements being found upon check stubs and in memoranda kept on loose sheets and scraps of paper scattered about this defendant's office.

Since the operations of the company had ceased in 1898 there was no need for the services of a manager; in fact, R. H. Kleinschmidt was never elected manager. Such duties as he performed in this capacity he assumed to perform without authority from anyone. The duties of secretary were thereafter of little consequence, and did not require this defendant to devote a great deal of time to them, though he did attend to the necessary correspondence. Prior to the bringing of this action, demand was made upon the board of directors to require R. H. Kleinschmidt to repay to the company the moneys appropriated by him to the payment of his salary. The demand was refused. Some time subsequent to the organization of the company, one H. W. Mady and one S. W. Hoag each became the owner of 100 shares of its capital stock, certificates for which were issued to and were held by them. These shares by proper transfers became the property of Ellen Kleinschmidt, who thereafter requested R. H. Kleinschmidt to issue to her certificates in her own name. This request was refused. In addition to the sums appropriated to the payment of his salary, R. H. Kleinschmidt expended from the funds of the company the sum of $1,531.23 to pay the expense of work done on a mining claim known as the Crescent, which is not owned by the company. The title to an undivided one-fourth interest in this claim is held by each of the brothers.

The complaint recites the history of the transactions of the company since R. H. Kleinschmidt and his associates assumed control of its affairs. It charges R. H. Kleinschmidt with incompetence and with wrongdoing in many particulars. Among

other things, it is charged that the appropriation of the sums of money above mentioned for the purposes stated was unwarranted and unlawful, constituting a breach of trust by R. H. Kleinschmidt and his associates. It is also charged that the accounts of the company have been so kept that it is impossible for plaintiffs to ascertain therefrom what disposition has been made of many other sums of money drawn by R. H. Kleinschmidt from the treasury of the company. It is charged that for this reason his services as secretary have been of no value. It is alleged that the defendant company has no debts nor obligations of any character; that hence it has no use for any funds now in its treasury, or for any funds that may be recovered from defendant Kleinschmidt in this action; that an order directing him to pay any amounts found due from him to the company would be nugatory, for the reason that he holds all the offices of the company having any control of its funds, or vested with any powers or duties, other than formal ones, and that because of his control over the board of directors any sums which he may be ordered to pay should be distributed directly to the stockholders.

The defendants answered jointly, denying directly or by counter-averments all charges of wrongdoing by defendant R. H. Kleinschmidt, or justifying his conduct of the affairs of the company on the ground that in every instance his acts had been authorized or ratified and approved by a majority of them constituting the board of directors. The court made special findings sustaining the charges touching the condition of the accounts of defendant Kleinschmidt and of misappropriation of the sums of money specifically mentioned. It entered a decree adjudging: (1) That Louis Hillebrecht as president, and R. H. Kleinschmidt as secretary, forthwith upon the presentation of the Mady and Hoag certificates by Ellen Kleinschmidt, make transfer of the same to her upon the books of the company; (2) that a referee be appointed to take and state an account between R. H. Kleinschmidt and the company of all receipts and disbursements from the date of his election until the date of the account, without

allowing credit, however, for any sum retained in payment of salary as secretary and manager, or any sum or sums expended in payment of work done on the Crescent claim; (3) that the referee shall hear such evidence as the parties may offer as to what is a reasonable fee to be allowed plaintiffs' attorneys for the prosecution of this action, and report a finding thereon; (4) that any balance found due from Kleinschmidt shall be paid by him to a receiver to be appointed upon the coming in of the referee's report; (5) that out of such sum, if any, found due from Kleinschmidt, coming into the hands of the receiver, there be paid to plaintiffs' attorneys such sum as the referee shall have found to be reasonable; and (6) that plaintiffs recover the costs of the action. Defendants have appealed from the decree and an order denying their motion for a new trial.

Mr. Massena Bullard, for Appellants, submitted a brief and argued the cause orally.

We take the position at the inception of this argument that the plaintiffs have no standing in court, because of the insufficiency of the complaint. There are no equities set out in the complaint; it does not state facts sufficient to constitute a cause of action. The plaintiffs are without authority to institute the action under the allegations of the complaint. The allegations of the complaint do not authorize an action by plaintiffs, either at law or in equity. This is an action for an accounting, the appointment of a receiver and for an injunction. It is an action in equity. Section 6698, Revised Codes, provides that a receiver may be appointed by the court in which an action is pending, in cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. In this case the defendant corporation had not been dissolved, but it appears from the pleadings that it was a going concern. It is not alleged that the defendant corporation is insolvent. On the contrary, it expressly appears that it has ample property and that it has no debts. It is not alleged that the corporation is in any danger whatever of insolvency;

nor that the corporation has forfeited its corporate rights. No *ultra vires* act is alleged. No fraud by the directors is alleged. No reason is given for bringing the action by the plaintiffs.

An injunction will not be granted where there is an adequate remedy at law, and in this case there is an adequate remedy at law. (1 Beach on Injunctions, sec. 26; 1 Abbott's Trial Brief (Pleading), 439.)

A stockholder may not sue to restrain directors of a corporation until he has exhausted all other means to obtain redress, and in this case it does not appear that the plaintiffs have exhausted all other means of redress.

If money has been misappropriated by an officer, the corporation may recover it at law, as on its refusal to sue, a stockholder may sue in behalf of the corporation, but a receiver may not be appointed. (*Alabama Coal & Coke Co.* v. *Shackelford,* 137 Ala. 224, 97 Am. St. Rep. 23, 34 South. 833; *Howe* v. *Deuel,* 43 Barb. (N. Y.) 504.)

Unless absolutely necessary to preserve the property, the court may not appoint a receiver of a corporation and take the management out of the hands of its directors, although the latter may be charged with fraud and mismanagement. (2 Clarke & Marshall on Private Corporations, sec. 556.)

Under the allegations of the complaint in this case, a stockholder may not maintain this action. (3 Pomeroy's Equity Jurisprudence, secs. 1093–1095.) Any abuse alleged in the complaint could be remedied by an action at law. (*City of Quincy* v. *Steel,* 120 U. S. 244, 30 L. Ed. 624, 7 Sup. Ct. Rep. 520.) If there are abuses within the corporation, it does not appear from the complaint that any effort has been made by the plaintiffs to correct them. (2 Page on Private Corporations, secs. 885, 886; *Hawes* v. *Oakland,* 104 U. S. 450, 26 L. Ed. 827.) The management of the corporation must be left to the sound discretion of the directors. (*Hunt* v. *American Grocery Co.,* 80 Fed. 70.)

Because the complaint does not state facts sufficient to constitute a cause of action, and because it does not appear from

the allegations of the complaint that the plaintiffs are in a position to sue as individual stockholders, the complaint should have been and should now be dismissed and judgment should have been and should now be entered for the defendants.

Trustees will not be interfered with in the management of the interests committed to them, unless it clearly appears that they are acting fraudulently, wrongfully and in violation of the trust committed to them. There is no evidence in this case upon which to base an assault upon the integrity of the trustees or officers of the American Mining Company, Limited. (*Hunt* v. *American Grocery Co.*, 80 Fed. 70.)

Messrs. Walsh, Nolan & Scallon, for Respondents, submitted a brief; *Mr. Wm. Scallon* argued the cause orally.

If an officer of a corporation claims a salary, he must point to some prior resolution or contract which provides for or contemplates its payment. The services of a director of a corporation are presumed to be rendered "gratuitously," and if he claims otherwise, he must produce an antecedent resolution providing for payment to him. The courts are resolute in denying any right to recover "back pay." (3 Thompson on Corporations, 1st ed., 4380, 4382; *Holder* v. *Lafayette etc. Ry. Co.*, 71 Ill. 106, 22 Am. Rep. 89; *Kilpatrick* v. *Penrose Ferry Bridge Co.*, 49 Pa. 118, 88 Am. Dec. 497; *Cheeney* v. *Lafayette etc. Ry. Co.*, 68 Ill. 570, 18 Am. Rep. 584.) The case of *Martin* v. *Santa Cruz Water Storage Co.*, 4 Ariz. 171, 36 Pac. 36, is direct authority against a resolution authorizing back pay. The case of *Silverton* v. *Haughwout*, 44 Colo. 173, 96 Pac. 975, decides that "a director of a corporation who holds the office of secretary thereof is not entitled to compensation for his services as secretary in the absence of any provision in the charter or by-laws, resolution or contract, providing for the payment of compensation." And to the same effect is *Green* v. *Felton*, 42 Ind. App. 675, 84 N. E. 166.

The omission on defendant R. H. Kleinschmidt's part to make any claim for salary, so far as the records of the company show,

for six years, conclusively establish that there never was any implied agreement that he was to have a salary, and that the presumption of the law that his services, being a director and one of the principal owners, were gratuitous, is in accordance with the fact. (*Brown* v. *Republican Mt. Silver Mines,* 17 Colo. 421, 16 L. R. A. 426, 30 Pac. 66.)

A resolution voting a salary to the president of a company, the directors of which were himself, a brother and two personal friends, each of the three last named being the owners of five shares of stock presented to them by the president, who was the majority stockholder, was held void in *Strouse* v. *Sylvester,* 6 Cal. Unrep. 798, 66 Pac. 660, the court saying: "We think the evidence fully justifies the finding that the resolutions giving these salaries were fraudulent, and made for the benefit and profit of Henry Sylvester by means of a subservient board selected and elected by him." (See, also, *Miner* v. *Belle Isle Ice Co.,* 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218; *Doe* v. *Northwestern Coal etc. Co.,* 78 Fed. 62.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

While not questioning, but acquiescing in, the propriety of that portion of the decree which awards relief to Ellen Kleinschmidt requiring the transfer to her of the Mady and Hoag certificates, the defendants contend that the complaint does not state facts sufficient to warrant any relief in other respects. It is said that it is defective in failing to allege facts showing that the plaintiffs had exhausted their remedy within the corporation, and that it must therefore follow that this action cannot be maintained. The relief sought is not against the corporation, but against the individual defendant directors who, it is alleged, have made a misappropriation of the funds of the company. It is alleged that prior to the bringing of the action the plaintiffs demanded of the board of directors that it require the defendant R. H. Kleinschmidt to refund to the company the sums of money retained by him on account of salary, and

that it refused the demand. This allegation is sufficient to show that, so far as this item is concerned, the plaintiffs could [1] not obtain relief by application to the board. But aside from this, sufficient appears to show that any application to the board would have been futile, because it could not reasonably be expected that the board, which was dominated by R. H. Kleinschmidt, and which permitted him to pursue the course he did, would take any steps to redress the wrong complained of. Under these circumstances any demand upon the board was not necessary. "The law, which does not demand a request that a person or corporation sue him or itself, nor require the doing of any useless thing, as prerequisite to the accrual of a right of action, will therefore, in the circumstances here existing, permit the plaintiffs to maintain suit to undo or prevent the acts of directors or stockholders performed, or threatened to be performed, if such acts be, as to plaintiffs, *ultra vires.*" (*Forrester* v. *Boston & Mont. etc. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353; *McConnell* v. *Combination M. & M. Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.) However, whether proper demand was made upon the board, even if the circumstances had required it, is now wholly immaterial, because the directors all joined in the answer, making common cause with R. H. Kleinschmidt and justifying their action in his behalf. Of course it was necessary [2] to make the company a party; for, though the action is prosecuted by the plaintiffs, and plaintiffs and defendants are the real adversary parties, it is prosecuted for the benefit of the company. (*McConnell* v. *Combination M. & M. Co., supra.*)

That it is not alleged that the company is insolvent is not material. The right of minority stockholders to require the board of directors and the officers, to whom has been intrusted [3] the control of the affairs of the corporation, to account for property and funds misappropriated by them does not depend upon whether the corporation is insolvent or likely to become so. The directors are the agents and trustees of the stockholders, and they may be called to account for any misappropriation of property or funds in their hands, as such.

They are bound to the exercise of good faith in the administration [4] of their trust. They cannot be called to account for losses which are the result of mere error in judgment; nevertheless they may not divert the assets of the corporation to purposes wholly beyond the scope of their powers. Even within the scope of their powers they may not so direct affairs as to gain an unfair advantage or profit for themselves. In either case their conduct is a violation of their trust, and is in law deemed a fraud upon the stockholders not assenting to it. (*McConnell* v. *Combination M. & M. Co.*, 31 Mont. 563, 79 Pac. 248.)

That the facts alleged do not warrant the issuance of an injunction is also immaterial. The decree does not grant injunctive relief. The same may be said touching the demand for [5] a receivership. While the decree indicates an intention of the court to appoint a receiver to hold and make disposition of such funds as may be found due from R. H. Kleinschmidt by the report of the referee, the appointment has not been made. When this shall have been done the defendants may have cause for complaint; but the order, when made, would be a special order after final judgment, and as such reviewable on appeal. We may venture the remark, however, that resort to the appointment of a receiver to take charge of and disburse the balance found due will be unnecessary, because the court may just as well direct the payment of it to the American National Bank for disbursement under the arrangement made for the payment of dividends following the cessation of operations by the company in 1898, and thereafter pursued until R. H. Kleinschmidt concluded to take charge of the company's affairs.

It appears that subsequent to the action by the board on September 5, 1904, ratifying the appropriation of R. H. Kleinschmidt of $4,200 to the payment of part of his claim for salary, the board also ratified his further appropriation of $3,500 for the same purpose. It also by resolution fixed his salary at $300 per month, payable from January 5, 1898. Since it appears that R. H. Kleinschmidt kept the records of the proceedings at the directors' and stockholders' meetings well enough for all

practical purposes, and while so doing actually attended to all the correspondence of the company, giving his personal attention to the sales of ore and certain litigation in which the company became involved in connection with them, counsel for defendants contends that the finding that his services as secretary and treasurer were of no value is not sustained by the evidence. In any event, it is said that since, under the statute and the by-laws of the company, the board was authorized to appoint such subordinate officers and agents as the business of the company should require, and to allow them suitable compensation, it was entirely within the purview of this authority for the board in its discretion to allow a salary for services already rendered, as well as for those to be rendered, and that, though the soundness of its judgment as to the amount allowed might be open to question, its action cannot be overturned, in the absence of allegation and proof that it was prompted by fraudulent motives. Under the circumstances here presented, the question whether the services rendered were reasonably worth the sum allowed is, in our [6] opinion, entirely immaterial. The real question is whether a director of a corporation is entitled to compensation for past services which he assumed to perform, and which he might perform as a director, without previous provision made therefor by some action of the board tantamount to a promise to pay.

According to the rule announced in *McConnell* v. *Combination M. & M. Co.*, in the original opinion (30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194), and affirmed on the motion for rehearing (31 Mont. 563, 79 Pac. 248), the board of directors has not the inherent power to vote a salary to any director. "The power to do so must emanate from the stockholders, from the statute, or from by-laws legally enacted." This rule is inflexible, and is recognized by the decisions and text-writers everywhere. (*Eakins* v. *American White Bronze Co.*, 75 Mich. 568, 42 N. W. 982; *Ashton* v. *Dashaway Assn.*, 84 Cal. 61, 7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091; *Wood* v. *Lost Lake etc. Co.*, 23 Or. 20, 37 Am. St. Rep. 651, 23 Pac. 848; *Kilpatrick* v. *Penrose Ferry Bridge Co.*, 49 Pa. 118, 88 Am. Dec. 497; *Cheeney* v. *Lafayette*,

B. & M. Ry. Co., 68 Ill. 570, 18 Am. Rep. 584; *Pfeiffer* v. *Lansberg Brake Co.*, 44 Mo. App. 59; *New York etc. R. Co.* v. *Ketchum*, 27 Conn. 170; *Hall* v. *Vermont etc. R. Co.*, 28 Vt. 401; *Blue* v. *Capital Nat. Bank*, 145 Ind. 518, 43 N. E. 655; 4 Thompson's Law of Corporations, sec. 4862.) Equally inflexible is the [7] rule that the directors—the managing officers of the corporation—cannot legally vote themselves compensation for past services. (*McConnell* v. *Combination M. & M. Co., supra; New York etc. R. Co.* v. *Ketchum, supra; Branch Bank* v. *Collins*, 7 Ala. 95; *Holder* v. *Lafayette, B. & Miss. Ry. Co.*, 71 Ill. 106, 22 Am. Rep. 89; Cook on Stock and Stockholders, sec. 657.) [8] So, also, when a director voluntarily or by the direction of the board assumes to perform the duties of secretary or treasurer, without prearrangement by resolution or by-laws, or by contract, for compensation, he is not entitled to recover on a *quantum meruit* for past services, and any appropriation made by the board for such services is equivalent to giving away the assets of the corporation. (Cook on Stock and Stockholders, sec. 657; *Butts* v. *Wood*, 37 N. Y. 317; *Silverton Min. Co.* v. *Haughwout*, 44 Colo. 173, 96 Pac. 975; *National Loan & Inv. Co.* v. *Rockland Co.*, 94 Fed. 335, 36 C. C. A. 370; *Martin* v. *Santa Cruz W. Storage Co.*, 4 Ariz. 171, 36 Pac. 36; *Brophy* v. *American Brewing Co.*, 211 Pa. 596, 61 Atl. 123; *Holder* v. *Lafayette, B. & Miss. Ry. Co., supra; St. Louis etc. R. R. Co.* v. *O'Hara*, 177 Ill. 525, 52 N. E. 734, 53 N. E. 118.) There are cases which hold that a director may recover for services clearly outside of his duty as such, without any precedent resolution fixing the compensation to be paid for them. (*Bassett* v. *Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082; *Taussig* v. *St. Louis etc. R. R. Co.*, 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969.) We are not disposed to hold that under certain circumstances this may not be true. It was well said, however, in *National Loan etc. Co.* v. *Rockland, supra:* "From the employment of an ordinary servant, the law implies a contract to pay him. From the service of a director, the implication is that he serves gratuitously. The latter presumption prevails, in the absence of an

understanding or an agreement to the contrary, when directors are discharging the duties of other offices of the corporation to which they are chosen by the directory, such as those of president, secretary, and treasurer." Again, in *Holder* v. *Lafayette, B. & M. Ry. Co., supra,* in denying the right of a director to recover for past services as treasurer of the corporation, the court said: "The board of directors were in the possession of the funds and property of the corporation, and that body had entire control over it, and could disburse it as they chose, either by themselves, by one or more of their number, or by some other person not of the board of directors. Having done so through one of their members, we must suppose that they chose to regard it as a part of his duty as director. Had not such been the intention, it seems to us that a salary would have been provided by a by-law or resolution." We think the facts disclosed in this case neither call for nor permit any relaxation of the general rule.

The corporation never having elected to do business under the Code of 1895 or subsequent legislation, the powers of its board are determined by the Compiled Statutes of 1887 (Civ. Code 1895, sec. 401 [Rev. Codes 1907, sec. 3816].) Under the Compiled Statutes of 1887 (Fifth Division, sec. 454), its board was authorized to adopt by-laws. It was also authorized to appoint such subordinate officers and agents as its business required, and allow them suitable compensation. (Section 482.) **[9]** It adopted by-laws providing for the appointment of a secretary and treasurer, but never at any time fixed their compensation. If at any time it had appointed as such officers stockholders or persons not connected with the directory, doubtless even in the absence of a previous resolution or contract, such subordinates would be entitled to compensation. No principle of public policy would have been violated, and the rule heretofore announced would not apply. Until R. H. Kleinschmidt assumed control of the business of the corporation, however, the duties of secretary had been performed by Albert Kleinschmidt without compensation. For five years and a half thereafter they

were performed by R. H. Kleinschmidt in the same way, no claim being made at any time, or intimation given, that he intended to claim compensation. Under these circumstances the conclusion seems inevitable that he performed the services in his directorial capacity; and, having done so without previous understanding by himself and the board that he was to receive compensation, he was not entitled to the amounts withdrawn from the funds of the company, and it was beyond the power of the board to ratify his action.

Finally, counsel contends that the evidence does not sustain the finding that the amount expended upon the Crescent claim should be charged to R. H. Kleinschmidt as a misappropriation of the funds of the company, because it appears that the interests held therein by the brothers are held by them as trustees of the company and not in their own right. It does not appear what the original source of title was, nor how the interests were acquired. Moreover, the evidence is in conflict as to the capacity in which they hold the title. Albert Kleinschmidt testified that the title was originally acquired with the purpose to convey it to the company, but that when the differences arose between him and his brother this purpose was abandoned. While there is evidence tending to show that at one time the brothers treated their interests as belonging to the company, there is also evidence tending to show that both brothers considered their respective interests as their own. There is nothing in the evidence to show that the funds of the company were used to acquire the title. Upon this condition of the evidence we cannot say that it preponderates against the finding.

The decree and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

STATE EX REL. KEHOE, APPELLANT, *v.* STROMME ET AL., RESPONDENTS.

(No. 3,445.)

(Submitted February 14, 1914. Decided March 20, 1914.)

[139 Pac. 1002.]

Special Elections—Registration of Voters—Closing of Registration Books—Statutory Construction—Prohibition.

Special Elections—Closing of Registration Books—Statutory Construction.

1. *Held*, that sections 7 and 18, Chapter 74, Laws of 1913, the former of which requires the closing of the registration books for a period of thirty days before the holding of a special election, while the latter provides for publication of notice of such closing for thirty days prior thereto, are controlling, and that section 33 declaring that at special elections copies of the official register and check lists used at the last preceding general election must be used, is ineffective as in contravention of the purpose of the Act, when considered in its entirety.

Same—Prohibition.

2. Where in calling a special election the county commissioners did not allow the county clerk sufficient time to comply with the requirements of sections 7 and 18 of Chapter 74, Laws of 1913, relative to closing registration books and giving notice thereof, the election could not legally be held, and the clerk was entitled to a writ of prohibition to prevent it.

[As to irregularities in calling or conducting elections, see notes in 83 Am. Dec. 749; 90 Am. St. Rep. 46].

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

PROHIBITION by the state, on relation of Dave Kehoe, as county clerk, recorder, and *ex-officio* registrar of the county of Silver Bow, against Gus J. Stromme and others, as county commissioners of such county. From a judgment denying the writ and dismissing the proceeding, the relator appeals. Reversed.

Mr. Jas. E. Murray, for Appellant, submitted a brief and argued the cause orally.

Mr. Jos. J. McCaffery and *Mr. J. V. Dwyer*, for Respondents, submitted a brief; *Mr. McCaffery* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The board of county commissioners of Silver Bow county, desiring authority to borrow $100,000 with which to complete, equip and furnish the county jail building, adopted a resolution on December 23, 1913, calling a special election for February 24, 1914, for the purpose of submitting that question to the qualified electors of the county. On February 7, 1914, the relator, who is the county clerk of Silver Bow county, filed his [1] petition in the district court for a writ of prohibition, alleging, in substance, that sufficient time had not been afforded him to comply, and therefore he had not complied, with the provisions of sections 7 and 18 of Chapter 74, Laws of 1913, which require the closing of the registration books for thirty days prior to any special election, and the publication of notice of such closing for thirty days prior thereto, and that by reason of such noncompliance the election, if held, would be void, and would entail the useless expenditure of a large sum of public money. The respondents admitted that sufficient time had not been afforded the relator as county clerk to comply with the provisions of sections 7 and 18 of Chapter 74, Laws of 1913, denied that such compliance was necessary, and alleged "that for the purposes of said election the respondents have proceeded in compliance with the provisions of section 33, Chapter 74, above referred to, and intend to and will use copies of the official register and check list which were printed and written before and used at the last preceding general election for the county of Silver Bow, together with all such valid electors as are registered up to and including the thirty-first day preceding the date set for said special election." Judgment on the pleadings was entered, denying the writ and dismissing the proceedings. From that judgment this appeal was taken, and thereafter the decision of this court, reversing the same, was announced, the opinion to follow when the business of this court might permit.

It must be appreciated at the outset that the attack was upon the election, not after, but before, its occurrence, and therefore the rules announced in *Potter* v. *Furnish*, 46 Mont. 391, 128 Pac.

542, and *Reid* v. *Lincoln County*, 46 Mont. 31, 125 Pac. 429, as favoring the validity of elections after the event, have no application. The question presented in the present case was whether sections 7 and 18, Chapter 74, Laws of 1913, are the governing provisions, or whether section 33 of the same law, unaided by any administrative device, is controlling. We say "unaided by any administrative device," because it is quite obvious that the purpose of the board to make provision for the electors who were registered after the general election of 1912 could not change the situation. The manifest effect of section 33 is to exclude from special elections every elector whose name does not appear upon the registration books used at the last preceding general election, and, however desirable it may be to avoid that result in any case, it cannot be done by administrative effort.

Chapter 74, Laws of 1913, is a re-enactment, with amendments, of Chapter 113, Laws of 1911. Its obvious purpose is to provide a scheme for perpetual registration suitable to all elections under all conditions, and the amendments consist largely in making the various provisions applicable to special as well as to general elections. In the original Act section 7 required that "during a period of thirty days immediately preceding any general election * * * such registration shall be closed." Section 7 of the Act of 1913 provides that "during the period of thirty days immediately preceding any general or special election * * * such registration shall be closed." In the original Act section 18 required that "the county clerk * * * must cause to be published * * * for thirty days before which time when such registry book shall be closed for any general election * * * a notice," *etc.* Section 18 of the Act of 1913 adds the words "or special" before "election" in this provision. From these alone it would seem reasonably clear that the legislature did intend special elections to be governed by these particular provisions. In no less than seven other places like changes are made from the original Act of 1911, reading "general election," to "general or special election" in the Act of 1913. These changes occur precisely where they should occur

if the legislature, doubting the applicability to special elections of the Act of 1911, intended to remove that doubt, and the most elementary rules of construction require us to say that changes so deliberate, so consistent, and so persistent were thus intended.

Section 33, on the other hand, has been a part of our law at least since 1895. It appears as section 1222 of the Political Code of 1895, as section 491 of the Revised Codes of 1907, and as section 33 of the Act of 1911. In the plan of registration authorized by the Codes of 1895, and by the Revised Codes of 1907, this section had a function to perform, and, as no other mention of special elections occurs in the Act of 1911, it was not necessarily inconsistent with that; but it is in utter contravention of the purposes of the Act of 1913 as everywhere else expressed therein. It is quite true that in numerical order section 33 is the last word upon the subject; but this circumstance is not sufficient to prevail over all the other provisions indicating a different legislative intent. (Rev. Codes, sec. 3558.) On the contrary, historical considerations and considerations of context alike compel the conclusion that section 33 is an inadvertence—one of those clauses which occasionally creep into the body of an Act as the result of misconception or ill-advised amendment, but which cannot be given effect without violence to the clear and plain intent of the law considered in its entirety. (*State ex rel. Seres* v. *District Court*, 19 Mont. 501, 506, 48 Pac. 1104.)

Since special as well as general elections are within the **[2]** provisions of Chapter 74, Laws of 1913; since the county clerk of Silver Bow county was required by sections 7 and 18 of that Act to close the registration books for thirty days before the proposed election and to give thirty days' notice of such closing prior thereto, and since this was not done, the election could not be legally held, and should have been prohibited by the district court.

For these reasons, the judgment of that court was reversed, with directions to grant the relief prayed for by the appellant.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. GENERAL ELECTRIC CO., RELATOR, v. ALDERSON, SECRETARY OF STATE, RESPONDENT.

(No. 3,447.)

(Submitted February 24, 1914. Decided March 25, 1914.)

[140 Pac. 82.]

Foreign Corporations—Articles of Incorporation—Filing Fees—Interstate and Intrastate Commerce—Licenses—Constitution—Statutory Construction.

Foreign Corporations—Articles of Incorporation—Filing Fee—Nature of Exaction.

1. *Held*, that the fee fixed by section 165, Revised Codes, based on the amount of capital stock, for the recording and filing of certificates of incorporation in the office of the secretary of state, is not a property tax but a license exacted of every corporation, domestic as well as foreign, engaged in intrastate business, for the privilege of doing business within the state, enjoying the protection of its laws and the pecuniary advantages afforded by its markets.

Same—Right to do Business—Nature of Right.

2. The right of a foreign corporation to engage in purely local private business in this state is a matter of grace on the part of the commonwealth, and not a matter of right on the part of the corporation.

Same.

3. *Semble:* In view of the principle announced in paragraph 2 above, it would seem that, in the absence of any contract right of a foreign corporation to engage in business in this state, the state might directly exclude it altogether, or do so indirectly by attaching impossible or unreasonable conditions, or such as transgress some constitutional guaranty secured to the corporation in the state of its domicile.

Statutory Construction.

4. In construing a state statute, courts must adopt that construction which, without doing violence to the fair meaning of the words used, brings the Act into harmony with the provisions of the federal Constitution and laws.

Foreign Corporations—Articles of Incorporation—Filing Fee—Validity of Statute.

5. Section 165, Revised Codes, though inoperative so far as it authorizes the secretary of state to exact prescribed fees for recording and filing certificates of incorporation of foreign corporations engaged in *interstate* commerce, is valid as to such corporations seeking to engage in strictly private, *intrastate* business.

Original application for writ of mandate, by the state, on relation of the General Electric Company, against A. M. Alderson, secretary of state, to compel the latter to file a copy of its charter, *etc.* Dismissed.

Messrs. Gunn, Rasch & Hall, for Relator; *Mr. M. S. Gunn* argued the cause orally.

Mr. D. M. Kelly, Attorney General, and *Mr. W. H. Poorman,* Assistant Attorney General, for Respondent, submitted a brief; *Mr. Poorman* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The General Electric Company is a New York corporation with a capital stock of the par value of $101,378,600, and owns property of the value of more than $100,000,000, all located in states other than Montana. Desiring to conduct business in this state, the company tendered to the secretary of state, for filing, a duly authenticated copy of its charter, a properly verified statement, a duly executed certificate appointing an agent, and the agent's acceptance of the office, together with a fee of $13. The secretary of state refused to file any of the papers unless a fee of $10,322.86 was paid; hence this proceeding.

Sections 4413 and 4414, Revised Codes, provide that a foreign corporation of the character of this one, before doing business in this state, must file with the secretary of state: (a) A duly authenticated copy of its charter; (b) a verified statement showing the amount of its capital stock, its assets, liabilities, *etc.;* (c) a certificate appointing a local agent upon whom service of process can be made; and (d) the written consent of the agent to act. Section 165, Revised Codes, fixes the fees which the secretary of state shall collect as follows: "IV. For recording and filing each certificate of incorporation and each certificate of increase of capital stock, the following amounts shall be charged: Amounts up to $100,000.00, fifty cents per thousand dollars. Additional from $100,000.00 to $250,000.00, forty

cents per thousand dollars. Additional from $250,000.00 to $500,000.00, thirty cents per thousand dollars. Additional from $500,000.00 to $1,000,000.00, twenty cents per thousand dollars. Additional over $1,000,000.00, ten cents per thousand dollars. Providing that no fee for filing any articles of incorporation or increase of capital stock shall be less than $20.00, except religious societies, churches, and organizations for religious purposes, not having a capital stock, and not being organized for the purpose of profit. * * * X. For filing each certified copy of charter or articles of incorporation of any foreign corporation, the same fee shall be charged as is provided for in Article IV of this section, for domestic corporations."

It is conceded that the papers tendered for filing were properly prepared and tendered, and that the amount of the fee demanded is correct, according to the schedule above. We are also advised by counsel that the business to be conducted by relator, if admitted into this state, will be strictly private, local, or intrastate business, and we are thereby relieved from any consideration of questions affecting interstate commerce or agencies [1] of the government. It is insisted, however, that section 165 above is invalid, as applied to this relator and other foreign corporations similarly situated, because it seeks to impose a tax upon property, none of which is within the state or within the jurisdiction of the taxing power of the state; and it is insisted that this doctrine is established and further discussion foreclosed by the decision in *Chicago, M. & St. P. Ry. Co.* v. *Swindlehurst,* 47 Mont. 119, 130 Pac. 966. That case was determined upon an agreed statement of facts which recited that the Chicago, Milwaukee and St. Paul Railway Company is a Wisconsin corporation, engaged as a common carrier in interstate commerce, and owning and operating lines of railway in South Dakota and other states; that the Chicago, Milwaukee and Puget Sound Railway Company is a Washington corporation, likewise engaged in interstate commerce as a common carrier and owning and operating a line of road from the Puget Sound across Montana to Mowbridge, South Dakota, where it connects with

the road first named above; that the Milwaukee company was then about to purchase the line of the Puget Sound company, and desiring to secure the advantages afforded by section 4299, Revised Codes, tendered to the secretary of state a copy of its charter and $1 as a filing fee. The secretary of state declined to file the paper unless a fee of $23,447.31, computed under subdivisions IV and X of section 165, Revised Codes, was paid. It was assumed that it was necessary for the Wisconsin corporation to file a copy of its charter with the secretary of state. It was contended by its counsel that the exaction of a fee under section 165, Revised Codes, based upon the entire capital stock, interfered with the interstate business of the company and imposed a tax upon property situated without the state of Montana. After stating the questions involved and the contention of the railway company, this court, speaking through the Chief Justice, said: "The question submitted for decision is whether section 165 is invalid for either or both reasons assigned." Reference was then made to the decisions in *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190, *Pullman Co.* v. *Kansas,* 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. Rep. 232, *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146, 54 L. Ed. 423, 30 Sup. Ct. Rep. 280, and *International Text-Book Co.* v. *Pigg,* 217 U. S. 91, 54 L. Ed. 678, 27 L. R. A. (n. s.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, and of these it was remarked: "These cases, particularly the first, are directly in point." A review of those cases was then made, and it was said: "This court is concluded by these decisions, and hence must declare section 165, *supra,* in so far as it applies to foreign corporations seeking to engage in interstate commerce in this state, inoperative and void." Nothing whatever is said in the opinion upon the contention made that the statute seeks to impose a tax upon property of the company without the state, and that question will now be treated as *res integra.*

That the fee demanded by section 165 is not a property tax at all is plainly apparent. Article XII of our state Constitution provides for public revenue to be raised by taxation. Section 1

enjoins upon the legislature the duty to prescribe such regulations as will secure a just valuation for taxation of all property, except such as is or may be exempt. Sections 11 and 7 provide:

"Sec. 11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

"Sec. 7. The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by this Constitution exempted from taxation."

The rate of taxation for state purposes is fixed by section 9, as amended, and can never exceed two and one-half mills on each dollar of valuation. The property exempt from taxation is enumerated in section 2499, Revised Codes. Section 2502 provides: "All taxable property must be assessed at its full cash value. * * * "

The fee demanded by section 165 is graduated according to the par value of the company's capital stock, without reference to the full cash value of the property owned by the corporation. For instance: A corporation with a capital stock of $100,000 is required to pay only $50, though its property represented by that capital stock may be worth a million dollars. Furthermore, this fee is not a recurring one; it is demanded but once. That the legislature did not treat it as a property tax is indicated by the failure to provide any means for its collection. A foreign corporation may be denied admission here, but it cannot be made to pay the fee in the same sense that any other tax-paying individual or corporation may be coerced into paying property taxes. This fee does not become a lien upon any property which the corporation may have in this state, as does a property tax under section 2600, Revised Codes. The amount of this fee is fixed by law and does not vary from time to time, while the rate of taxation for property taxes is fixed by the legislature

for the state and by the county boards for the respective counties, and varies from year to year with the necessities for greater or less revenue. These considerations justify our conclusion that the fee is not a property tax. It is an impost, an excise, or a license tax exacted of every corporation, domestic as well as foreign, engaged in intrastate business, for the privilege of doing business within this state, enjoying the protection of our laws and the pecuniary advantages afforded by our markets. It is authorized by our state Constitution, which declares: "The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state." (Art. XII, sec. 1.) The par value of the capital stock is merely made the standard or measuring rod, upon the assumption, whether justified or not, that the advantages gained by corporations in transacting business within this state will be in some measure proportioned according to the amount of their capital stock.

We are unable to appreciate the distinction attempted to be made by the supreme court of the United States between the Kansas statute, considered in *Western Union Tel. Co.* v. *Kansas*, above, and held to impose a general tax upon all of the property of the company, and the statute of Massachusetts, considered in *Baltic Min. Co.* v. *Massachusetts*, 231 U. S. 68, 58 L. Ed. 000, 34 Sup. Ct. Rep. 15, and held to be a mere excise; but, if we have accurately characterized our section 165 above, the latest pronouncement by that court justifies the existence of our statute and the method employed for determining the amount of the tax. It may be that our legislation is unwise in failing to fix a reasonable limit upon the amount to be exacted from any one corporation; but, if the authority is lodged in the state to exclude the relator altogether or to impose such terms to its admission here as may seem expedient, then the amount of the fee affords no tenable ground of opposition to the validity of the statute. If the amount demanded is more than the local, private business of relator will justify it paying, the tax can be avoided altogether by a renunciation of its intention to do such

business. The state does not seek to compel it to engage in business here, nor does it attempt to collect this fee in the sense that property taxes or ordinary debts may be enforced. It merely says to the relator: You may engage in local, private business in Montana if you conform to the conditions imposed; otherwise you must stay out.

If any one question can ever be deemed settled, this one ought [2] to be settled, *viz.:* that a foreign corporation engages in purely local, private business in this state as a matter of grace on the part of the state, and not as a matter of right on the part of the corporation. From the decision in *Bank of Augusta* v. *Earle,* 13 Pet. 519, 10 L. Ed. 274, to the present day, that principle has been announced so often that further discussion of it ought to be deemed foreclosed.

In *Paul* v. *Virginia,* 8 Wall. 168, 19 L. Ed. 357, the court, in considering the status of a foreign corporation, said: "The recognition of its existence even by other states, and the enforcements of its contracts, made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

In *Hooper* v. *California,* 155 U. S. 648, 39 L. Ed. 297, 15 Sup. Ct. Rep. 207, there was involved the right of the state to exact a license fee and certain security from a foreign corporation seeking to engage in business in California, and of that right the court said: "The state of California has the power to ex-

clude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end." The doctrine was reaffirmed in *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28, 44 L. Ed. 657, 20 Sup. Ct. Rep. 518.

No right guaranteed by the Constitution of the United States has been found more conveniently useful to corporations than the provision conferring upon federal courts jurisdiction of controversies arising between citizens of different states, and yet a state statute has been upheld which provides for revoking the license of a foreign corporation engaged in local, private business, if it removes a cause to the federal courts. (*Doyle* v. *Continental Ins. Co.,* 94 U. S. 535, 24 L. Ed. 148; *Security Mut. Life Ins. Co.* v. *Prewitt,* 202 U. S. 246, 50 L. Ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317.)

The foregoing would seem to justify the conclusion that, in [3] the absence of any contract right on the part of this relator to engage in business here, the state might exclude it altogether, and, as the corollary of that, might accomplish the same purpose by attaching impossible conditions, or conditions altogether unreasonable, or which transgress some constitutional guaranty secured to the company in the state of its domicile.

However, in *Baltic Min. Co.* v. *Commonwealth,* above, the authority of the state over the foreign corporation appears to be made to depend somewhat upon the validity of the reason which

it assigns for its action, as evidenced by the following: "For example, a state may not say to a foreign corporation: You may do business within our borders if you permit your property to be taken without due process of law. * * * To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union." Whatever may finally be determined to be the extent of state control over a foreign corporation situated as relator is, we are satisfied that the exaction demanded in this instance does not infringe upon any right of this relator which is guaranteed to it by the Constitution or laws of the United States, and that the state may rightfully say: You may come into this state and engage in local, private business only on condition that you pay the fee required under section 165, above. (*Kehrer* v. *Stewart*, 197 U. S. 60, 49 L. Ed. 663, 25 Sup. Ct. Rep. 403; *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171, 48 L. Ed. 134, 24 Sup. Ct. Rep. 39; *Pullman Co.* v. *Adams*, 189 U. S. 420, 47 L. Ed. 877, 23 Sup. Ct. Rep. 494.)

But it is urged that, since section 165 above has been declared to be invalid, the secretary of state did not have any authority for demanding the fee which he attempted to collect in this instance. Assuming the premise, the conclusion is inevitable; but we are not prepared to agree with counsel that section 165 was held to be invalid in the *Swindlehurst Case*, above, though it must be conceded at once that there is to be found, in the language employed in the opinion, some justification for the argument now advanced. That was an action to recover a filing fee paid under protest, and the one question presented for determination was: Can the secretary of state demand the fee mentioned in section 165, subdivisions IV and X, from a foreign corporation seeking to engage in interstate commerce in this state? We held that he cannot, because to permit him to do so would impose a burden upon interstate commerce, and we epitomized our conclusion in the one sentence: "This court * * * must declare section 165, *supra*, in so far as it applies to foreign

corporations seeking to engage in interstate commerce in this state, inoperative and void." In our opinions we do not always employ language exactly apposite. The result rather than the form of expression is the factor kept in view, and is the factor which ought to be considered alone in determining what was decided in any given case. But, if we erred in our form of expression or in the reasons which prompted our conclusion, no false pride will deter us in the least from making correction at the earliest possible opportunity.

It is an elementary rule of constitutional law and of statutory construction that the court shall adopt that construction of a [4] given state statute which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution and laws of the United States. (*Grenada County Supervisors* v. *Brown*, 112 U. S. 261, 28 L. Ed. 704, 5 Sup. Ct. Rep. 125.) It will not be assumed that our legislature intended to usurp powers prohibited to it (*Sykes* v. *Mayor*, 55 Miss. 115); and, since it had been determined long prior to the enactment of section 165, above, that such an exaction from an interstate carrier could not lawfully be made by a state, we must asssume that our lawmakers legislated in view of the declared policy of the law and intended to include only such foreign corporations as could lawfully be subjected to state regulation or control.

It is true the terms used in section 165 are general—"any foreign corporation"; but these general words are to be construed [5] so as to bring the statute into harmony with controlling statutory or constitutional provisions rather than to attach to them a meaning which assumes that the legislative assembly intended to usurp a power specifically denied to it by the Constitution of the United States. (*Marshall* v. *Grimes*, 41 Miss. 27.) This rule was enforced in *Ford* v. *City of Great Falls*, 46 Mont. 292, 127 Pac. 1004, where we considered the provisions of section 3386, Revised Codes, which in terms subject all property within a given district to the tax for special improvements. We held that, since the legislature could not authorize a tax or

assessment against property of the United States, the general terms of the statute would be held to include only such property as could be made subject to the assessment. The distinction between section 165, above, and the statute considered in *State* v. *Northern Pac. Express Co.*, 27 Mont. 419, 94 Am. St. Rep. 824, 71 Pac. 404, and the assessment treated in *State* v. *Western Union Tel. Co.*, 43 Mont. 445, 117 Pac. 93, is too clear to require comment.

To have been technically exact, we should have said in the *Swindlehurst Case* that section 165 does not have any application to foreign corporations seeking to engage in interstate commerce in this state. This is our holding, and, thus stated, the statute is left intact to apply to foreign corporations over which this state has the right to exercise some degree of regulation or control.

Our conclusion is that the secretary of state was fully justified in demanding the fee under subdivisions IV and X of section 165, and for this reason the motion to quash the alternative writ of mandate heretofore issued is sustained, and this proceeding is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied April 27, 1914.

HICKS ET AL., APPELLANTS, *v.* RUPP ET AL., RESPONDENTS.

(No. 3,352.)

(Submitted March 19, 1914. Decided March 28, 1914.)

[140 Pac. 97.]

Cancellation of Instruments — Complaint — Insufficiency — Quieting Title—Construction of Pleadings.

Complaint—Sufficiency—How Determined.

1. A complaint will be sustained, as against attack on the ground of insufficiency to state a cause of action, if under the facts alleged plaintiff is entitled to relief from any point of view.

Cancellation of Instruments—Jurisdiction.

2. Where the invalidity of an instrument which it is sought to have canceled because a cloud upon plaintiff's title, appears directly or constructively upon its face, a court of equity is, under sections 6115 and 6116, Revised Codes, without jurisdiction to interfere.

Same—Complaint—Contents.

3. To invoke the jurisdiction of a court of equity in a suit looking to the cancellation of an instrument (a contract of sale of real property in the case at bar), it was necessary for plaintiff to allege that the instrument was of such a character that, if left outstanding, it would be a menace to his title, or probably imperil it.

Same—Complaint—Sufficiency.

4. Complaint, though insufficient to invoke the equity power of the court to cancel an instrument said to cast a cloud upon plaintiff's title, *held* sufficient to state a cause of action at law to recover, as damages, the value of personal property delivered to defendants under a contract of sale of ranch property including said personalty, as well as of the use and occupation of the land during the period it was in their possession.

[As to cancellation of instruments notwithstanding a defense at law, see note in 9 Am. St. Rep. 859.]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

ACTION by James H. Hicks and another against Albert Rupp and others. From a judgment dismissing the action, and from an order denying a new trial, plaintiffs appeal. Reversed and remanded.

Messrs. Galen & Mettler, for Appellants, submitted a brief; *Mr. Mettler* argued the cause orally.

Mr. George A. Maywood submitted a brief in behalf of Respondents, and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to have canceled a contract for the sale of real estate and personal property, and for damages. A demurrer interposed to the complaint having been overruled, issues were made up by answer thereto and reply. At the trial, however, when the plaintiffs offered evidence to sustain their allegations, the defendants objected to its introduction, on the ground that the complaint did not state a cause of action. The objection was sustained. Thereupon, after a formal offer of proof by plaintiffs which was rejected, the court dismissed the action, and ordered judgment for the defendants for costs. The plaintiffs have appealed from the judgment and an order denying their motion for a new trial.

The complaint alleges that on April 9, 1910, the plaintiffs and the defendants entered into a contract, by the terms of which the plaintiffs agreed to sell to the defendants, and defendants agreed to buy, a tract of land consisting of about 2,280 acres, together with a large amount of personal property thereon, situated in Lewis and Clark county, at a gross price of $30,000; that the plaintiffs were the owners of the property; that the defendants paid to the plaintiffs the sum of $5,000, and agreed to pay the balance of $25,000 on or before January 1, 1911; that the plaintiffs thereupon, and in accordance with the terms of the contract, delivered to the defendants all of said property, and that defendants took possession of it; that thereafter, on May 13, 1910, the defendants paid to plaintiffs the further sum of $5,000 to apply on the purchase price; and that there was then deposited in escrow by the plaintiffs a warranty deed, duly executed and acknowledged, to be delivered to defendants upon their payment of the full sum of $20,000 without interest, as stipulated in the contract. A memorandum signed by the parties, accompanying the escrow, stated the purpose of the deposit and the condition upon which the depositary should make a delivery to the defendants. It provided that, in case payment should not be made promptly on or before January 1,

1911, as stipulated in the contract, the escrow should be returned to the plaintiffs on demand within thirty days, at the expiration of which period the responsibility of the depositary should cease. It is alleged that on or about January 1, 1911, the defendants, without notice to plaintiffs, and without their knowledge or consent, abandoned possession of the land, and left it wholly unoccupied; that the land remained so unoccupied until on or about March 21, 1911, when the plaintiffs resumed possession, by reason of the termination of the rights of the defendants; that defendants wholly failed to make the payment of $20,000, though demand therefor was frequently made by plaintiffs; that, upon such demand, the defendants informed the plaintiffs that they renounced the contract and refused to recognize any liability thereunder; and that on the last-mentioned date the plaintiffs elected to rescind the contract, and, through their attorneys, gave defendants written notice of their election. The notice is set out in the complaint. After reciting generally the terms of the agreement, the possession and use by the defendants of the property, and their refusal to make the final payment of $20,000, it continues: "We are therefore directed by Mr. and Mrs. Hicks to notify you, and we do hereby notify you, and each of you, that they do now rescind the contract for the sale of their ranch and property to you, for the reason that you have not paid in full the consideration therein agreed to be paid, and that the time for such payment has passed. The payment which you have made falls far short of compensating them for the actual market value of the personal property taken by you and converted to your own use, to say nothing of the damage to the ranch itself and for the use of the ranch, and for other damages caused to them by your failure to keep your contract." It is alleged that, when the defendants abandoned possession of the land, they removed therefrom all of the personal property included in the contract and converted it to their own use, having disposed of the greater portion of it to third persons. It is further alleged that the plaintiffs at all times were ready and willing to comply with

all the terms of the contract, and would have done so but for the conduct of the defendants, rendering their compliance impossible; and that they were thus compelled to elect to rescind the contract in order to protect their rights; and that the plaintiffs suffered damage by the conduct of the defendants in renouncing the contract to the amount of $23,532. This sum includes $14,000, the reasonable value of the personal property removed from the land when defendants abandoned it and converted to their own use, $3,600, the value of the use and occupation of the premises by the defendants during the time of their possession, and various other items claimed on grounds specifically alleged. It is further alleged that the contract of sale is a cloud upon plaintiffs' title. The prayer is that the contract be canceled; that plaintiffs have damages against the defendants in the sum of $23,532, less the payment of $10,000 made by the defendants at the time the contract was entered into; and that they be awarded the costs of the action. There is also a prayer for general relief.

So far as it is disclosed by the record, the theory upon which the trial court proceeded is indicated by the objection by counsel for the defendants to the introduction of evidence. The specific grounds thereof were: (1) That it appeared that the contract alleged, having been extinguished, no longer existed, and therefore that damages could not be recovered for a breach of it; and (2) that the damages alleged were not such as could be recovered for the breach of the contract under the provisions of the Codes. But it is not important to ascertain upon what theory the result was reached. That the action of the court in sustaining the objection was erroneous is clear. The question confronting the trial court was, and the one submitted to this court is, whether the complaint states facts sufficient to entitle the plaintiffs to any relief. The rule is well established in this jurisdiction, both by the statute and the numerous decisions [1] of this court, that, if upon the facts stated, from any point of view, the plaintiff is entitled to relief, the complaint will be sustained. (*Merk* v. *Bowery Min. Co.*, 31 Mont. 298, 78 Pac.

519; *Donovan* v. *McDevitt,* 36 Mont. 61, 92 Pac. 49; *Raymond* v. *Blancgrass,* 36 Mont. 449, 15 L. R. A. (n. s.) 576, 93 Pac. 648; Rev. Codes, sec. 6713.)

We inquire first, then, whether the facts stated justify the equitable relief demanded. A suit to have canceled and declared void an instrument which constitutes a cloud upon the title of plaintiff is referable to the general jurisdiction which courts of equity exercise upon the principle of *quia timet.* (*Arnold* v. *Fraser,* 43 Mont. 540, 117 Pac. 1064; *Fratt* v. *Daniels-Jones Co.,* 47 Mont. 487, 133 Pac. 700; Story's Equity Jurisprudence, 10th ed., sec. 701; 2 Pomeroy's Equitable Reme-
[2] dies, 685; 6 Cyc. 286.) In the Revised Codes are found these sections:

"Sec. 6115. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable may, upon his application, be so adjudged, and ordered to be delivered up or canceled.

"Sec. 6116. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury within the provisons of the last section."

These provisions, taken together, clearly define the rule, with its limitations, under which the equitable jurisdiction of the court may be invoked. The instrument in question must be in writing and must be of such a character that, if left outstanding, it will menace with injury the person against whom it is void or voidable; hence, if its invalidity appears directly or constructively upon its face, the court may not interfere. [3] Clearly, also, if it does not appear, either from the instrument itself or the statement of facts explaining its character, that, if left outstanding, it will or may result in injury, the court ought not to interfere. In other words, a case must be stated which falls within the rule. (*Castro* v. *Barry,* 79 Cal. 443, 21 Pac. 946; *Hibernia S. & L. Soc.* v. *Ordway,* 38 Cal.

679; 6 Cyc. 324.) In *Hibernia S. & L. Soc.* v. *Ordway*, it was said: "In an action to remove a cloud there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated. To merely name the instrument, therefore, might not ordinarily be sufficient." In order to invoke the jurisdiction, therefore, the complaint must disclose the facts necessary to show that, but for the interposition of the court, the plaintiff may suffer injury.

The complaint here fails to disclose that the contract is of such a character that, if it remains outstanding, it will be a menace to plaintiff's title or probably imperil it in any way. Apart from the bare legal presumption that it is in writing (the complaint does not state so specifically), and is therefore sufficient to meet the requirements of the statute of frauds, (*Sweetland* v. *Barrett*, 4 Mont. 217, 1 Pac. 745; *Ryan* v. *Dunphy*, 4 Mont. 356, 47 Am. St. Rep. 355, 5 Pac. 324; *Christiansen* v. *Aldrich*, 30 Mont. 446, 76 Pac. 1007; 1 Moak's Van Santvoord's Pleading, 3d ed., 266, 674; 9 Ency. Pl. & Pr. 700), it does not appear that it is of record or that it was executed with the formalities entitling it to be put upon record. Moreover, it is alleged that the defendants renounced it, repudiating all liability under it, and that the plaintiffs rescinded it, and resumed possession of the land. While sufficient is alleged to excuse the plaintiffs from making a formal offer to refund the payments made (*Arnold* v. *Fraser*, *supra*) in the particular above pointed out, the complaint is wholly insufficient to invoke the equity power of the court.

In the second place, we inquire whether the facts stated are [4] sufficient to warrant other relief. Stripped of the unnecessary allegations, we think the complaint states a cause of action at law, not for damages for a breach of the contract, but to recover, as damages, the value of the personal property retained by the defendants and the use and occupation of the land during the period it was in possession of the defendants. (Pomeroy's Equity Jurisprudence, sec. 110; *State* v. *Snyder*, 66

Tex. 687, 18 S. W. 106; 6 Cyc. 285.) Upon the repudiation of the contract by defendants and the rescission of it by the plaintiffs, the obligation at once arose upon the part of the former, without demand to restore to the latter the personal property received under the contract, and to render compensation for the use and occupation of the land, to say nothing of the other items claimed as additional damages. (Rev. Codes, secs. 5075, 5076.)

We are not concerned now with the question what the plaintiffs may be able to establish by the evidence. If they can show what they allege upon the plainest principles of justice, they will be entitled to a substantial verdict, after credit has been allowed to the defendants for the amounts paid by them.

The judgment and order are reversed, and the cause is remanded for trial on the merits.

Reversed and remanded.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

LUKERT, RESPONDENT, *v.* ELDRIDGE, APPELLANT.

(No. 3,363.)

(Submitted March 20, 1914. Decided March 30, 1914.)

[139 Pac. 999.]

Vendor and Purchaser—Real Property—Fraud—Misrepresentations—Cross-examination—Litigious Character of Party—Instructions.

Appeal and Error—Cross-examination—Litigious Character of Party—Harmless Error.

1. Error in putting questions to defendant on cross-examination in an action to recover a balance due on the purchase price of land and personal property, alleged by him to have been prejudicial because an attempt to exploit his litigious character before the jury, *held* harmless, his answers not having been such as to show that he possessed the character indicated.

Same—Examination of Witnesses—Proper and Improper.

2. Though the mere asking of questions may constitute error, the fact that a question, otherwise pertinent and proper, may tend to

prejudice a witness before the jury, furnishes no ground for its exclusion.

Same—Litigious Character of Party—Cross-examination—When Proper.

3. The litigious character of a party (or a witness) is not, generally speaking, a proper subject of inquiry; where, however, defendant, a man of wide business experience who had opportunity to and did examine land before purchasing, claimed in an action to recover a balance due on the purchase price that he had relied implicitly upon false statements made by plaintiff, a total stranger to him, and been overreached, questions on cross-examination seeking to elicit the fact that he had had many lawsuits were allowable.

Vendor and Purchaser—Real Property—Misrepresentations—Reliance upon.

4. An instruction which in effect told the jury that if defendant did not rely upon alleged misrepresentations made by plaintiff with respect to the character and quantity of land bought from him by the former but acted upon his own investigation, he could not recover upon his counterclaim based upon such misrepresentations, *held* not open to criticism.

Same—Opinions—Misrepresentations—Reliance upon.

5. Under an instruction that when a seller states his opinion as to the quality or quantity of land he is endeavoring to sell, and such statement is made merely as his opinion and not as a statement of fact which he knows to be true, the buyer cannot rely thereon but must exercise his own judgment, and in view of defendant's testimony that he knew plaintiff was only giving him his opinion on the subject, a verdict in favor of plaintiff was proper.

[As to liability of vendor for false representations innocently made, see note in Ann Cas. 1913C, 63.]

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Roy J. Lukert against George C. Eldridge. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Mr. E. L. Bishop and *Mr. I. W. Church*, for Appellant, submitted a brief, as well as one in reply to that of Respondent, and argued the cause orally.

The evidence as to the litigious character of defendant admitted over objection was irrelevant and impertinent to any issue in the case, and was incompetent for the purpose of impeaching or discrediting defendant, and inadmissible for any purpose, both on general principles and under the special provisions of the Montana statute. (*Palmeri* v. *Manhattan Ry. Co.*, 133 N. Y. 261, 28 Am. St. Rep. 632, 16 L. R. A. 136, 30 N. E. 1001; *Taylor* v. *McFatter* (Tex. Civ.), 109 S. W. 397;

Cecil v. *Henderson*, 119 N. C. 422, 25 S. E. 1018.) The rule as to the cross-examination and impeachment of witnesses is established by the Revised Codes of Montana; and the same rules apply to parties as to other witnesses. (*Borden* v. *Lynch*, 34 Mont. 503, 87 Pac. 609; *State* v. *Crow*, 39 Mont. 174, 102 Pac. 579; *People* v. *Harlan*, 133 Cal. 16, 65 Pac. 10.) The error was prejudicial. (*People* v. *Un Dong*, 106 Cal. 88, 39 Pac. 12; *People* v. *Wong Ah Leong*, 99 Cal. 442, 34 Pac. 105; *Sharon* v. *Sharon*, 79 Cal. 633, 22 Pac. 26, 131.)

The rule of law as laid down in the fourth and eighth instructions, to the effect that defendant had a right to rely upon positive statements of plaintiff as to the quantity of land under irrigation without investigation, and to recover if the purchase was induced by false representations, the falsity of which were not known or apparent and obvious to him, is amply sustained by the authorities. (See *Post* v. *Liberty*, 45 Mont. 1, 121 Pac. 475; *Eichelberger* v. *Mills Land etc. Co.*, 9 Cal. App. 628, 100 Pac. 117; *Wooddy* v. *Benton Water Co.*, 54 Wash. 124, 132 Am. St. Rep. 1102, 102 Pac. 1055; *Judd* v. *Walker*, 114 Mo. App. 128, 89 S. W. 558; *McGhee* v. *Bell*, 170 Mo. 121, 59 L. R. A. 761, 70 S. W. 493.)

Messrs. Cooper & Stephenson and *Mr. R. M. Armour*, for Respondent, submitted a brief; *Mr. Sam R. Stephenson* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by plaintiff to recover $1,195, the balance of the purchase price of certain real and personal property sold by plaintiff to the defendant. The answer admits the purchases, the failure to pay the amounts demanded, and pleads two counterclaims: one for $162.50, the value of a certain horse—a part of the personal property sold by plaintiff—title to which failed, including also costs and expenses incurred in connection therewith, and the other for $2,500, damages claimed

to have been suffered by defendant by reason of misrepresentations, alleged to have been made by the plaintiff as to the amount of the land sold by plaintiff to defendant which was susceptible of irrigation, the character of a particular piece of the land lying across Sun river from the rest, and the location of a proposed line of railway across the ranch. Issues were joined by reply, and a trial of the cause resulted in a verdict in favor of plaintiff for the amount claimed, less $157.50, allowed to defendant upon his first counterclaim. The defendant has appealed from the judgment and from an order denying him a new trial. There are but two assignments of error and but two questions presented for decision.

1. The defendant testified that plaintiff represented that 400 acres of the land could be irrigated, and that the land across Sun river was the best piece of land on the ranch; that he relied upon these statements and was deceived, as only 250 acres could be irrigated at most, and the land across Sun River was rocky, gravelly, and almost worthless. Upon cross-examination he was interrogated with reference to his relationship to plaintiff and to the land, and the reason which prompted him to rely upon plaintiff's statements, if he did so. A part of his cross- [1] examination, which exhibits the first alleged error, follows:

"I am seventy-one years old and have been in business ever since I was old enough to be in business; I never thought a lawsuit was liable to grow out of this transaction.

"Q. You have had a good many lawsuits?

"A. Yes, a few.

"Q. Four or five since you have been in Montana?

"Mr. Bishop: That is objected to as incompetent.

"The Court: Overrule the objection. (To this ruling counsel for defendant then and there excepts.)

"A. Not that I know of.

"Q. How many lawsuits did you have in Oklahoma?

"Mr. Bishop: We object to that as immaterial, not proper cross-examination, and incompetent.

"The Court: Overrule the objection. (To this ruling of the court, defendant then and there duly excepted.)

"A. I have never had a suit I could get out of, unless I gave up everything I had," *etc.*

It is insisted that the attempt to exploit before the jury defendant's litigious character constituted prejudicial error. So far as the answers of the witness are concerned, no prejudice could have resulted. They were not responsive to the questions, and do not indicate that defendant maintained the character which it is insisted the questions were designated to [2] portray; we recognize, however, that prejudice may result merely from asking questions. Sections 8030 and 8031, Revised Codes, are designed to protect a witness from improper and irrelevant questions and questions intended merely to degrade him, but if a particular question is pertinent and otherwise proper, the fact that it may tend to prejudice the witness before the jury furnishes no ground for its exclusion.

From defendant's own testimony it was disclosed that at the [3] time he purchased the property in question from the plaintiff he had but recently come to Montana from Oklahoma; that plaintiff and the agent with whom he negotiated were strangers to him; that he had gone upon the land and made some examinations for himself; had the means of irrigation pointed out to him, could observe the quantity of land under the ditches, and had an opportunity to examine the character of all the land, but did not make much of an examination on his own account. His only excuse for not doing so was that he relied implicitly upon plaintiff's representations and was overreached. Ordinarily, when fraud is alleged and the party relying upon it says, "I believed the statement and was deceived," there is no possible means of contradicting him by direct evidence. His statement must go unchallenged, or a liberal rule of cross-examination must be allowed. "The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests, which the law has devised for the discovery of truth. By means of it the situation of the

witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony. It is not easy for a witness, who is subjected to this test, to impose on a court or jury; for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended." (1 Greenleaf on Evidence, 16th ed., sec. 446.)

The rule of cross-examination in vogue in this state was announced in *Kipp* v. *Silverman,* 25 Mont. 296, 64 Pac. 884, and has been repeated so often since that a reference to some of the cases suffices here. (*Hefferlin* v. *Karlman,* 30 Mont. 348, 76 Pac. 757; *State* v. *Howard,* 30 Mont. 518, 77 Pac. 50; *State* v. *Biggs,* 45 Mont. 400, 123 Pac. 410; *Knuckey* v. *Butte Electric Ry. Co.,* 45 Mont. 106, 122 Pac. 280; *Moss* v. *Goodhart,* 47 Mont. 257, 131 Pac. 1071.)

In the present instance no one could say that defendant had not relied upon the statements which he claims the plaintiff made to him, but whether he did or not was an important inquiry, and, to determine the truth or falsity of his testimony, the relative situations of the parties at the time of the transaction apparently afforded the best means for ascertaining the probability or improbability of defendant's story. (6 Ency. of Evidence 42; *City of Tacoma* v. *Tacoma L. & Water Co.,* 17 Wash. 458, 50 Pac. 55.) If it should have been made to appear that defendant was inexperienced in the ways of the business world; that he was unsophisticated, provincial, could not read or write, or bore such intimate relationship to plaintiff as to warrant implicit confidence, the trial court might have accepted his story without question, but if, on the other hand, it was

made to appear that plaintiff and defendant were strangers dealing at arm's length; that defendant was a man of education who had traveled much, had enjoyed many years of successful business experience, had been involved in tranactions which led to litigation; that he had the opportunity to examine this property for himself—it would be asking a great deal of the trial court to find that defendant had been deceived only because he had relied with confidence upon the statements of a stranger with reference to matters open before him for investigation. The course of this cross-examination tended to indicate the probability or improbability of defendant's contention, and was, under the circumstances of this particular case, allowable. We are not to be understood that the litigious character of a party or a witness is generally a proper subject for a jury; on the contrary, it is not generally a proper subject of inquiry. Our holding is limited to the particular case presented.

2. Complaint is made of instruction No. 9, given by the court, [4] as follows: "On behalf of the plaintiff it is denied that any false representations were made to the defendant with respect to the quantity of land under the ditch, as well as the character of land across the river, and that the defendant himself, and by his agent, investigated said land and the conditions surrounding the same for himself, and was advised of all the facts himself before he bought said land. If you find from the evidence that the defendant, individually, or through his agent, if he had one, undertook to and did investigate the said land to his satisfaction, and examined the same before making said purchase, in that event the defendant would not be entitled to recover anything on account of the alleged shortgage of the land under said ditch, or the character of land across the river referred to in the pleadings."

It is said that defendant's right to recover thus depended upon whether he made an investigation of the land for himself before purchasing, and that this instruction was in effect a direction against him, since the word "investigate" means to make inquiry, and it is conceded that defendant did inquire

of plaintiff concerning the land; but this is scarcely a fair statement of the proposition. The word "investigate" means: "To follow up step by step by patient inquiry or observation; to trace or track mentally; to search into; to inquire and examine into with care and accuracy; to find out by careful inquisition." (Webster's International Dictionary.) By other instructions the court directed the jury to find for defendant if the evidence disclosed that plaintiff made representations with respect to these matters which were untrue, but which were believed by defendant and relied upon by him to his injury. In effect, instruction No. 9 presents the alternative, that if the jury found that defendant did not rely upon statements made by plaintiff, but did rely upon his own investigation, he could not recover upon his second counterclaim so far as it relates to the quantity of land under the ditch and the character of the land across Sun river. The form of the instruction is not open to the criticism leveled at it. In *Grinrod* v. *Anglo-American Bond Co.*, 34 Mont. 169, 85 Pac. 891, we said: "When it appears that a party who claims to have been deceived to his prejudice, has investigated for himself, or that the means were at hand to ascertain the truth or falsity of any representations made to him, his reliance upon such representations, however false they may have been, affords no ground of complaint." It seems impossible that the jury could have been misled.

By instruction No. 11 the court, without objection, directed [5] the jury as follows: "You are instructed that when one person states to another his opinion as to the value, character, quality, or quantity of land which he is endeavoring to sell, and such statement is made merely as a statement of his opinion, and not as a statement of a fact that he knows to be true, then the person to whom such opinion is stated has no right to rely thereon, but must exercise his own judgment." On cross-examination defendant testified: "He [Lukert] showed me where the line ran, and said what was below the ditch was under the ditch and what was above the ditch wasn't under the ditch. He said there was about 400 acres under the ditch. He didn't

say he had measured it; he said that was the understanding when he bought the place. He didn't represent to me that he had made any measurements to find out how much was under the ditch. I understood that he was just giving me his opinion, that is, his estimate, of how much was under the ditch. I don't know anything about whether the land across Sun river was under the ditch." In the light of instruction No. 11 and this evidence, a verdict in favor of defendant upon the second counterclaim, based upon any alleged misrepresentation respecting the amount of land susceptible of irrigation, could not stand, and this eliminates altogether the principal question presented by this specification, for it appears from the evidence that the amount of land across Sun river was deemed to be so small as not to influence the defendant to any considerable extent in making the purchase.

Upon the whole case made, no reversible error appears, and the judgment and order are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. DWYER, RESPONDENT, *v.* DUNCAN, MAYOR, ETC., APPELLANT.

(No. 3,375.)

(Submitted March 21, 1914. Decided April 3, 1914.)

[140 Pac. 95.]

Metropolitan Police Law—Police Officers—Wrongful Dismissal—Mandamus — Restoration to Office — Municipal Officers — Undertaking on Appeal—Technicalities—Ordinances—Waiver.

Municipal Officers—Undertaking on Appeal.

1. On appeal from an adverse judgment in an action against the mayor of a city in his official capacity, he is not, under section 7196, Revised Codes, required to furnish an undertaking.

Mandamus—Existence of Office—Affidavit—Sufficiency.

2. In the absence of special demurrer, or motion to make more specific, the existence of the office to which plaintiff sought restoration was

sufficiently stated by the allegation of the affidavit for the writ of *mandamus* that he was appointed to the office of lieutenant of police of the police department of the city of B., a permanent existing office, created under the rules and regulations of the department promulgated by the city council and under authority of the statute.

Same—Pleadings—Evidence—Objection—Estoppel.

3. Defendant mayor was estopped to object to the introduction in evidence of an ordinance, the existence of which he himself pleaded in his answer.

Actions—Trial—Technicalities.

4. In the determination of a lawsuit, an honest effort to adjust the relative rights of the parties should govern, to the exclusion of mere technicalities.

Metropolitan Police Laws—Removal of Officers—Violation of Statute.

5. *Held*, under the Metropolitan Police Law (Rev. Codes, secs. 3304—3317) that the act of defendant mayor and city council in retiring a lieutenant of police to the eligible list, on the ground of economy, and immediately thereafter appointing another to fill the same office, was a violation of the civil service principle of that statute and did not deprive plaintiff of his office.

[As to removal of public officers for cause, see note in 135 Am. St. Rep. 250.]

Ordinances—Force and Effect.

6. An ordinance of a city, when duly passed, has the force and effect of a statute.

Metropolitan Police Law—Restoration to Office—Waiver—Defense not Available, When.

7. Though one office is vacated by the incumbent accepting another and incompatible one, since it is against public policy that the duties of more than one office which are inconsistent and incompatible should be performed by one person, defendant mayor was not in position to raise the point that plaintiff waived the right to be restored to the office of lieutenant of police by accepting temporarily, pending proceedings for restoration, an appointment as deputy county inspector of weights and measures.

Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

MANDAMUS by the state, on the relation of Michael J. Dwyer against Lewis J. Duncan, as mayor of the city of Butte. Judgment for plaintiff and defendant appeals. Affirmed.

Messrs. Alexander Mackel, Wm. F. Davis and *N. A. Rotering*, for Appellant, submitted a brief, as well as one in support of his objection to Respondent's motion to dismiss the appeal; *Mr. Rotering* argued the cause orally.

Mr. J. E. Healy, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This proceeding in *mandamus* was instituted by Michael J. Dwyer to compel the mayor of Butte to restore him to the office of lieutenant of police in the police department of the city of Butte. From a judgment awarding the peremptory writ, this appeal is prosecuted. To avoid confusion of terms, the relator in the lower court will be designated plaintiff, and the mayor defendant.

1. A motion to dismiss the appeal has been interposed upon [1] the ground that an undertaking on appeal was not furnished. Section 7196, Revised Codes, provides that an undertaking on appeal shall not be required from any municipal officer who appeals in an action or proceeding to which he is a party in his official capacity. In his affidavit for the writ plaintiff alleges: "13. That at all times herein mentioned the said defendant and respondent was and is the mayor of the City of Butte, Silver Bow County, Montana, and all of the said acts and things herein set forth and complained of were done and suffered and committed as against the said relator and by said respondent in the official character and capacity of respondent, as the executive head of the police department of the said city of Butte," *etc.* This statement was made advisedly. As an individual, the defendant is powerless to make any order affecting the police force of the city of Butte. It is only by virtue of the fact that he appears in his official capacity that a cause of action can be stated against him. Under the section above, he was entitled to prosecute this appeal without furnishing an undertaking.

2. Contention is made that the affidavit for the writ does not state a cause of action, in that it does not allege the existence [2] of the office to which plaintiff seeks restoration. The allegation of the affidavit is: "6. That in December, 1910, and on the 28th day thereof this affiant was permanently appointed to the office of the lieutenant of police of the police department of the city of Butte, the same being an office created under

the rules and regulations of the said department and by those promulgated by the city counsel of the said city, in addition to and under authority of the statute in that case made and provided, and said office is now and at all times has been a permanent office in the said police department of the said city, now existing and never abolished in any way." This is not the orthodox method of pleading the existence of an office created by a municipality and of the existence of which the court could not take judicial notice. The application of elementary rules of common sense to this allegation could not leave anyone in doubt as to the pleader's meaning. In the absence of a special demurrer or a motion to make more specific, this allegation is sufficient. Defendant himself in his answer alleges: "That on the 31st day of May, 1911, the above-named relator was a member of the police department of the said city of Butte, holding the position of lieutenant of police," and to this extent the answer aids the complaint or affidavit.

To prove the existence of the office, plaintiff offered in evi- [3] dence Ordinance 825 of the city of Butte, and we are introduced to a rather remarkable situation presented by defendant vigorously objecting to the introduction in evidence of an ordinance the existence of which he pleads in his answer as follows: "That there is in existence, and in full force and effect, Ordinance No. 825 of the series of ordinances of the city of Butte, entitled 'An ordinance establishing and creating a police department of the city of Butte, prescribing the duties and regulations of the members of said police department,' * * * which said ordinance created a police department within the said city of Butte under and by virtue of what is commonly known as the Metropolitan Police Law." The trial court properly refused to entertain the objection under these circumstances. The trial of a lawsuit is not a mere gladitorial [4] contest of wits. An honest effort to determine the relative rights of the parties is now being emphasized.

3. With these preliminary matters aside, the one question presented for our determination is: Was plaintiff entitled to be

[5] restored to the office of lieutenant of police? The circumstances of his probationary appointment to the police force, his permanent appointment, his appointment as lieutenant of police, his removal from active service to the eligible list, and the offer of the city to restore him to active service as a patrolman, need not be considered at length. Plaintiff was removed from active duty, along with fourteen or fifteen patrolmen, by resolution of the city council and direction of the mayor, because the department had more men in active service than the needs of the city demanded or its financial condition would justify. It appears that, in retiring these men to the eligible, waiting list, the authorities selected the members of the police force in the inverse order of their appointments, taking those who had served the shortest periods of time.

Our Metropolitan Police Law (sections 3304–3317, Rev. Codes) contemplates that in addition to the office of chief of police, which the Act itself creates, there shall be different grades and other offices established by the city council (section 3314), or by the mayor in the event the council fails to act (section 3305). For instance, in section 3308 it is provided: "The mayor and (or) the chief of police subject to the approval of the mayor shall have the power to suspend a policeman, *or any officer under the chief*, for a period of not exceeding ten days in any one month without any hearing or trial." The city of Butte by ordinance provided for the organization of its police department in conformity with that Act. Under Ordinance No. 825 above, the department comprises one chief of police, one captain, one lieutenant, two sergeants, three jailers, three patrol drivers, one detective, and such number of patrolmen as may be required. The Act also contemplates that charges against any officer in the department shall be heard by the examining and trial board (section 3309), and that reduction in rank or grade may be imposed as punishment in case the officer, other than the chief, is found guilty (section 3308).

The civil service principle is the foundation of the law. The fundamental idea upon which the system rests is that appoint-

ments to and promotions in the department shall depend upon merit and not upon favoritism. When Ordinance 825 was duly [6] passed, it had the force and effect of a statute. (28 Cyc. 391; McQuillin on Municipal Ordinances, sec. 12.) The office of lieutenant of police was created by that ordinance, and when filled by the appointment and qualification of plaintiff, he was protected by the life tenure principle to the same extent as is the chief of police, so long as the necessities which called for the creation of the office, in the first instance, exact that it be filled. The office of chief of police is required to be maintained. The subordinate offices need not be. They are created to meet the needs of the city; and if out of the necessities of any given case a reduction in the number of members of the force becomes imperative, patrolmen may be relegated to the eligible list—not, however, to make room for others—and likewise a captain, lieutenant, or sergeant may be retired from active service, but not to make way for someone else to take his office. The spirit of the law requires that, whenever additional patrolmen are needed, those who have been relegated to the eligible list shall be called in the order of their appointments; and if considerations of economy have caused the office of lieutenant of police to be vacated by the retirement of the incumbent to the waiting list, the same spirit of the law demands that, whenever that office is again filled, the former incumbent shall be restored, in preference to anyone else.

The record before us discloses that when this plaintiff was retired to the eligible list, and the office of lieutenant of police became vacant, the defendant immediately appointed another to fill the office. This was a clear violation of the civil service principle, and did not operate to deprive the plaintiff of his office.

4. It is insisted that whatever right plaintiff may have had to be restored to the office he seeks he waived by accepting an incompatible office. The record discloses that some time after [7] this proceeding was instituted, and while waiting for its termination, plaintiff accepted temporarily the appointment as

deputy inspector of weights and measures for Silver Bow county. We recognize the general rule to be as stated by counsel for appellant: That one office is vacated by the incumbent accepting an incompatible office. The reason for the rule is that it is contrary to public policy that the same individual should undertake to perform inconsistent and incompatible public duties (Mechem's Public Offices and Officers, sec. 419); but when the reason of a rule ceases, so should the rule itself. It appears as somewhat of a novelty in the law for this defendant to urge that the duties of the office of inspector of weights and measures are inconsistent with the duties which his own wrongful act prevents this plaintiff from performing. It will be time enough to raise this objection if plaintiff attempts to perform the duties of both offices at the same time.

We find no error in the record. The motion to dismiss the appeal is overruled and the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

GIBSON, ADMX., APPELLANT, *v.* MORRIS STATE BANK ET AL., DEFENDANTS; FINCH, RESPONDENT.

(No. 3,365.)

(Submitted March 21, 1914. Decided April 7, 1914.)

[140 Pac. 76.]

Equity—Quieting Title—Deed Absolute—When Mortgage—Burden of Proof—New Trial—Findings—Insufficiency of Evidence—Quitclaim Deeds.

New Trial Order—Insufficiency of Evidence—District Judges.

1. A district judge other than the one who presided at the trial of a cause, a new trial in which is asked on the ground of insufficiency of the evidence to justify the findings, must be governed by the rule observed by the supreme court on appeal *viz.:* The findings must not be set aside unless there is a decided preponderance in the evidence against them, nor must they be disturbed when the evidence as pre-

sented by the printed record furnishes reasonable ground for different conclusions.

Quitclaim Deeds—Title Acquired.

2. One who, though paying full value, accepts a quitclaim deed, takes such title only as his grantor had.

[As to effect of quitclaim deeds, see note in 105 Am. St. Rep. 854.]

Mortgages—Absolute Conveyance—Evidence.

3. Evidence *held* to clearly preponderate against the finding of the trial judge that a deed, given by the owner of land to a bank to which he was heavily indebted, was intended to be absolute and not as a further security for the debt as contended by the debtor.

Same—Form—Absolute Conveyance.

4. Where a deed absolute in form is given by a debtor to his creditor, and the indebtedness remains uncanceled, the conveyance is treated in equity as a mortgage.

Same—Burden of Proof—Character of Instrument.

5. The burden which is upon him who alleges that an absolute deed is a mortgage to establish that fact by clear and convincing evidence, is sustained by showing that the debt for which the conveyance was executed remains uncanceled and is treated as an existing indebtedness.

Same—Character of Instrument—Retention of Evidence of Indebtedness—Effect.

6. Where an absolute deed is given by a debtor to his creditor, and it appears that the antecedent debt has been canceled, the retention of the evidence of the debt by the grantee may be explained, but, if the indebtedness is not canceled and proceedings are instituted to enforce it, no explanation can avoid the conclusion that the deed was security only and not an absolute conveyance.

[As to effect of lapse of time on right to have deed declared a mortgage, see note in Ann. Cas. 1914C, 354.]

Appeal from District Court, Madison County; W. A. Clark, Judge.

ACTION by Mary Gleim against the Morris State Bank, Charles L. Finch, and others, in which Elizabeth Gibson, as administratrix of Mary Gleim, was substituted as plaintiff. From an order setting aside a decree in favor of the plaintiff and granting a new trial, plaintiff appeals. Affirmed.

Messrs. Hall & Whitlock, for Appellant, submitted a brief; *Mr. A. N. Whitlock* argued the cause orally.

We contend that the rule that the action of the lower court will not be disturbed in such a case as this, unless there was a clear abuse of discretion does not apply, since Judge Clark was in no better position to pass upon the weight or sufficiency of the evidence, or the correctness of any of the rulings or proceedings

made or had at the trial of the case, than is this court. (See *Orr* v. *Haskell,* 2 Mont. 225; *Tyler* v. *Haggart,* 19 S. D. 167, 102 N. W. 682; *Lavin* v. *Kreger,* 20 S. D. 80, 104 N. W. 909; *Wallace* v. *Wallace,* 26 S. D. 229, 128 N. W. 144; *Spackman* v. *Gross,* 25 S. D. 244, 126 N. W. 389.)

Where a deed, absolute on its face, is shown, the burden of showing that such deed was intended to operate as a mortgage is upon the party claiming that such was the intention. (*Murray* v. *Butte etc. Min. Co.,* 41 Mont. 449, 110 Pac. 497, 112 Pac. 1132; *Ganceart* v. *Henry,* 98 Cal. 281, 33 Pac. 92; *Winston* v. *Burnell,* 44 Kan. 367, 21 Am. St. Rep. 289, 24 Pac. 477; *Bryant* v. *Broadwell,* 140 Cal. 490, 74 Pac. 33; *Betts* v. *Betts,* 132 Iowa, 72, 106 N. W. 928; *Renton* v. *Gibson,* 148 Cal. 650, 84 Pac. 186; *Cadman* v. *Peter,* 118 U. S. 73, 30 L. Ed. 78, 6 Sup. Ct. Rep. 957; 27 Cyc. 1024.) While a court of equity looks with suspicion upon any transaction which may tend to clog an equity of redemption, yet a mortgagor may transfer the mortgaged premises to the mortgagee and such transaction will be upheld in the absence of fraud. (*Green* v. *Butler,* 26 Cal. 595; *Swarm* v. *Boggs,* 12 Wash. 246, 40 Pac. 941; *Watson* v. *Edwards,* 105 Cal. 70, 38 Pac. 527.) In cases of this sort the question as to whether or not the transfer to the mortgagee is to be treated as an absolute conveyance is of course one of intention. (*Pike* v. *Gleason,* 60 Iowa, 150, 14 N. W. 210.)

The retention of evidences of indebtedness is certainly not conclusive evidence that the conveyance was intended as a mortgage, and in fact under the circumstance in this case it is not evidence at all. (*Gray* v. *Nelson,* 77 Iowa, 63, 41 N. W. 566; *Blair* v. *Squire,* 6 Cal. Unrep. 350, 59 Pac. 211; *Larson* v. *Dutiel,* 14 S. D. 476, 85 N. W. 1006; *Harmon* v. *Banking etc. Co.,* 60 Or. 69, 118 Pac. 188; *Rathbone* v. *Maltz,* 155 Mich. 306, 118 N. W. 991.)

It will doubtless be contended that the plaintiff in this case cannot avail herself of the rights of a *bona fide* purchaser because she took under a quitclaim deed. We admit that there is considerable authority to the effect that a purchaser under a quitclaim deed cannot be considered a *bona fide* purchaser; but

the trend of modern authority is certainly the other way, and such authorities hold that while a quitclaim deed conveys only what the grantor has, yet a purchaser under it, in good faith, does not take subject to latent equities. (*Nidever* v. *Ayers*, 83 Cal. 39, 23 Pac. 192; *Frey* v. *Clifford*, 44 Cal. 335; *Graff* v. *Middleton*, 43 Cal. 341; *Coombs* v. *Aborn*, 29 R. I. 40, 14 L. R. A. (n. s.) 1248, 68 Atl. 817; *Eger* v. *Brown*, 77 Kan. 510, 15 L. R. A. (n. s.) 459, 94 Pac. 803; *Hilligas* v. *Kuns*, 86 Neb. 68, 20 Ann.Cas. 1124, 26 L. R. A. (n. s.) 284, 124 N. W. 925; *McDonald* v. *Belding*, 145 U. S. 492, 36 L. Ed. 788, 12 Sup. Ct. Rep. 892; *Moelle* v. *Sherwood*, 148 U. S. 21, 37 L. Ed. 350, 13 Sup. Ct. Rep. 426.) A distinction is made between the case where the grantor purports to convey the land itself and the case where a mere transfer of the grantor's interest is intended. The deed in this case purports to transfer the land itself. The language used is not the ordinary language of a quitclaim deed, as will be seen by comparing the case with *Nidever* v. *Ayers*, cited above. The distinction referred to is clearly brought out in the case of *Prentice* v. *Duluth Storage etc. Co.*, 58 Fed. 437, 7 C. C. A. 293.

Mr. W. A. Pennington, for Respondent, submitted a brief and argued the cause orally.

The supreme court of California has steadfastly held, through a long line of decisions, that an appeal from an order granting or refusing a new trial by a judge who did not try the case, comes before the appellate court under exactly the same conditions and subject to the same presumptions as appeals in cases where the case was tried and order on motion for new trial made by the same judge. (*Wendling Lumber Co.* v. *Glenwood Lumber Co.*, 153 Cal. 411, 95 Pac. 1029; *Whitaker* v. *California Door Co.*, 7 Cal. App. 757, 95 Pac. 910; *Churchill* v. *Flournoy*, 127 Cal. 355, 59 Pac. 791; *Garton* v. *Stern*, 121 Cal. 347, 53 Pac. 904, 905; *Jones* v. *Sanders*, 103 Cal. 678, 37 Pac. 649; *Hausmann* v. *Sutter St. Ry. Co.*, 139 Cal. 174, 72 Pac. 905; *Altschul* v. *Doyle*, 48 Cal. 535; *Macy* v. *Davila*, 48 Cal. 646; *Wilson* v. *California Cent. R. Co.*, 94 Cal. 166, 17 L. R. A. 685, 29 Pac. 861; *Bradley* v. *Davis*, 156 Cal. 267, 104 Pac. 302.)

Plaintiff cannot claim anything as an innocent purchaser for value. She received from the bank a quitclaim deed, which gives her only such rights as the bank had. (*Wetzstein* v. *Largey*, 27 Mont. 212, 70 Pac. 717; *Butte Hardware Co.* v. *Frank*, 25 Mont. 344, 65 Pac. 1; *McAdow* v. *Black*, 6 Mont. 601, 13 Pac. 377; *Pellow* v. *Arctic Iron Co.*, 164 Mich. 87, Ann. Cas. 1912B, 827, 47 L. R. A. (n. s.) 573, 128 N. W. 918; *Starr* v. *Bartz*, 219 Mo. 47, 117 S. W. 1125; *Newberry* v. *Chicago Lumbering Co.*, 154 Mich. 84, 117 N. W. 592; *Messenger* v. *Peters*, 129 Mich. 93, 88 N. W. 209; *Peters* v. *Carter*, 80 Mich. 124, 20 Am. St. Rep. 508, 45 N. W. 73.)

The law protects a necessitous debtor who signs away his rights under threats of foreclosure, even when the notes or evidences of debts are surrendered and canceled, but when, as in this case, the notes are held, credited, indorsed and transferred, and the mortgage is held, transferred and assigned, "together with the notes therein described and the money due and to grow due thereon with interest" and the assignment further states that the assignee "may take all lawful means for the recovery of said money and interest," there is no escaping the conclusion that the transaction is a mortgage. The rule is recognized and declared by our own supreme court and it is the universal rule. (*Murray* v. *Butte etc. Min. Co.*, 41 Mont. 449, 110 Pac. 497, 112 Pac. 1132; *Rairden* v. *Hedrick*, 46 Mont. 510, 129 Pac. 498; *Worley* v. *Carter*, 30 Okl. 642, 121 Pac. 669, 671; *Todd* v. *Todd*, 164 Cal. 255, 128 Pac. 413; *Bradbury* v. *Davenport*, 114 Cal. 593, 55 Am. St. Rep. 92, 46 Pac. 1062; *Locke* v. *Moulton*, 96 Cal. 21, 30 Pac. 957; *Locke* v. *Moulton*, 132 Cal. 145, 64 Pac. 87; *Alexander* v. *Rodriguez*, 79 U. S. (12 Wall.) 323, 20 L. Ed. 406; *Simpson* v. *First National Bank*, 93 Fed. 309, 35 C. C. A. 306; Devlin on Deeds, secs. 1120, 1117, 1108; Jones on Mortgages, secs. 285, 325, 300, 266; 27 Cyc. 1011, 1012; 4 Kent's Commentaries, 159.)

Mr. M. M. Duncan, for Defendant Morris State Bank, submitted a brief.

A warranty deed is one of the most solemn documents known to the law. It will not be set aside, annulled or held to be other

than it purports to be on its face upon slight or trival evidence. Some courts have gone so far as to say that in order to change the effect of an instrument, in form a deed absolute, "it must be shown beyond a reasonable doubt that such instrument is not what it purports to be." (*Townsend* v. *Petersen*, 12 Colo. 491, 21 Pac. 619; *Tilden* v. *Streeter*, 45 Mich. 533, 8 N. W. 502; *Worley* v. *Dryden*, 57 Mo. 226; *Gerhardt* v. *Tucker*, 187 Mo. 46, 85 S. W. 552; *Farmers' etc. Bank* v. *Smith*, 61 App. Div. 315, 70 N. Y. Supp. 536; *Satterfield* v. *Malone*, 35 Fed. 445, 1 L. R. A. 35.) But the better rule appears to be "that when there is an absolute deed in form, either with or without a contemporaneous agreement for the resale of the property, there being nothing on the face of the collateral papers to show a contrary intent, the presumption of law, independent of evidence, is that the transaction is what it purports to be, and he who asserts that the writing should be given a different construction must show by clear and convincing evidence that a mortgage and not a sale was intended." (*Johnson* v. *National Bank of Commerce*, 65 Wash. 261, 118 Pac. 21; *Kegley* v. *Skillman*, 68 Wash. 637, 123 Pac. 1081.) This rule has the support of at least two decisions of the supreme court of the United States. (*Wallace* v. *Johnstone*, 129 U. S. 58, 32 L. Ed. 619, 9 Sup. Ct. Rep. 243; *Bogk* v. *Gassert*, 149 U. S. 17, 37 L. Ed. 631, 13 Sup. Ct. Rep. 738.)

The *Gassert Case* mentioned was taken on a writ of error to the United States supreme court from a decision of the supreme court of this state and the above doctrine or rule was announced in that case by the United States supreme court.

As to whether a deed absolute in form is a mortgage, the test held by most authorities is this: Was the preceding debt extinguished, or was it continued? If extinguished, no mortgage, but deed. If continued, a mortgage and not a deed. (*Hickox* v. *Lowe*, 10 Cal. 197; *Bickel* v. *Wessinger*, 58 Or. 98, 113 Pac. 34; *McNamara* v. *Culver*, 22 Kan. 661.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was originally brought by Mary Gleim to foreclose two mortgages upon a tract of land situate in Madison county, and described as the west half and the southeast quarter of section 35, and the southwest quarter of section 36 in township 1 south of range 2 west of the Montana principal meridian. Subsequently the complaint was amended so as to change the action into one to quiet title. It was tried and decided upon the latter theory. After the appeal had been taken to this court, Mary Gleim died, and Elizabeth Gibson, the administratrix upon her estate, was substituted as plaintiff in her stead. The deceased obtained the title by quitclaim deed from the Morris State Bank of Pony, Montana, dated January 12, 1911. The title of the bank was evidenced by a warranty deed executed to it by the defendant Chas. L. Finch, dated January 7, 1907. This deed, though acknowledged, was not recorded. Prior to the date of the deed, Finch had become indebted to the bank in various amounts, for which he had executed his promissory notes as follows: One for $2,275, dated March 21, 1903; a second for $145, dated April 21, 1903; a third for $1,627.25, dated June 7, 1905; and a fourth for $700, dated June 7, 1905. To secure the payment of the first three of these notes, he had given mortgages to the bank upon all the land described. When the mortgages were executed, Finch was not the legal owner of the southwest quarter of section 36, but held it under a contract of purchase from the state of Montana. The note for $700 was executed for money borrowed to pay the balance of the purchase price due the state. As additional security for its payment, Finch assigned to the bank his contract of purchase, and on June 10 thereafter a patent was issued by the state directly to the bank. The bank gave Finch a written statement to the effect that it held the title only as security for the payment of his indebtedness. At the time the warranty deed was executed, Finch's indebtedness to the bank amounted to about $5,000. The bank did not then nor thereafter surrender

Finch's notes, nor cancel the mortgages, but retained them intact. Just prior to or about the time of this transaction, Finch and the bank had executed a lease of the land to one Carter, the bank joining because it was the apparent owner of the 160 acres lying in section 36, under the patent. Finch then went to Silver Bow county, and resided there until this action was brought. The bank collected the rent from Carter, and, after paying the taxes on the land and other charges, indorsed credits upon the second and third notes, but kept an account thereof upon its books under the title "C. L. Finch, Rental Ac." At the time the mortgage to secure the first note was executed, Finch was a single man. Before the latter transactions occurred, Finch and his codefendant, Adelene Vian Finch, began to cohabit as husband and wife, and held themselves out as such until the land was leased to Carter. Apparently they separated at that time, and have lived apart ever since. The latter refused to join in the second mortgage and deed to the bank. When the deed was executed by the bank to the deceased, all the notes were transferred to her order without recourse, except the second. As appears by a memorandum written upon it, it had been fully discharged out of the rent received by the bank from Carter. By formal assignments in writing also, the mortgages, together with the notes secured by them, were transferred to the deceased. Each of the assignments authorized her, at her own cost and expense, "to have, use, and take all lawful ways and means for the recovery of said money and interest; and, in case of payment, to discharge the same mortgages as fully as the party of the first part might or could do if these presents were not made." Though the defendant Adelene Vian Finch filed an answer, she did not appear, nor was she represented at the trial.

The issues presented by the pleadings were two, *viz.:* (1) Whether the deed from Finch was intended as a mortgage by way of additional security for the indebtedness due, or was intended by him and accepted by the bank as a conveyance to it of his equity of redemption in full payment and discharge of his indebtedness; and (2) whether the deceased was a *bona fide* purchaser for value. The court found the issues in favor

of the plaintiff. A decree was rendered and entered accordingly. The defendant Chas. L. Finch made his motion for a new trial on the ground, among others, of insufficiency of the evidence to justify the decision. During the pendency of the motion, the term of office of Hon. Lew L. Callaway, the judge who presided at the trial, expired, and the motion was submitted to Hon. W. A. Clark, who granted it. The plaintiff has appealed.

Though defendant's notice of intention receives several of the statutory grounds for a new trial, apparently the only ground urged at the hearing in the district court was the insufficiency of the evidence to justify the findings. We therefore have before us for decision the single question whether Judge Clark [1] erred in granting the motion on that ground. It is argued by counsel for the plaintiff that, while it is the general rule that an order determining a motion for a new trial on the ground of insufficiency of the evidence will not be disturbed if the evidence presents a substantial conflict, this rule has no application to a case in which, as in this, the motion has been submitted to and determined by a judge other than the one who presided at the trial. They say that, inasmuch as Judge Clark, not having seen the witnesses or heard their testimony, was compelled to gain his knowledge of the case from the record alone, he was in no better position to determine the motion than is this court, and hence that his order does not carry with it the presumption usually indulged on appeal in favor of such an order, *viz.:* That the ruling of the trial court will be accepted as conclusive, unless an abuse of discretion is made apparent. It is therefore argued that this court should examine the record and determine the question submitted, without regard to the conclusion arrived at by Judge Clark. The same contention was made in the recent case of *Leveridge* v. *Hennessy,* 48 Mont. 58, 135 Pac. 906, but was not considered or determined, because, as disclosed by the record, there was a decisive preponderance of the evidence in favor of the conclusion reached by the judge who presided at the trial, and hence there was no room for the exercise of discretion by the judge

who ordered a new trial. It was there said: "The question is an interesting one and unsettled in this state, but we do not deem the present case an opportune one for its consideration." The statement that the question is unsettled in this state is not entirely correct. Several decisions heretofore made by this court either directly or in principle support counsel's contention. In the early case of *Orr* v. *Haskell*, 2 Mont. 225, in affirming an order denying a motion for a new trial, the court said: "It must be clear that the jury has erred before a new trial will be granted, on the ground that the verdict is against the weight of the evidence or unsupported by it. And, if this is the rule, as it undoubtedly is, even in the court where the cause is tried, and before whom the witnesses appear and testify, *a fortiori* ought it to be the rule when another court decides the motion for a new trial, with no other knowledge of the facts than is derived through the imperfect medium of a written statement." In *Landsman* v. *Thompson*, 9 Mont. 182, 22 Pac. 1148, after discussing and affirming the rule which ordinarily applies to cases presenting substantially conflicting evidence, the court said: "The rule above cited is based upon the ground that the judge below has heard the oral testimony, has observed the demeanor of witnesses, and had the benefit of living, speaking testimony, which in the supreme court is reduced to a lifeless printed record, for which reason it is presumed that the trial judge was in a better position to exercise a sound discretion than is the appellate court; and, if it does not appear that he has abused such discretion, his action will not be disturbed. In the case at bar, the judge who granted the motion was other than the one who presided at the trial. The court has not therefore the benefit of the judgment of the trial judge, based upon his view of the animate witnesses. We occupy the same point of view as the judge passing upon the motion in this case, as far as the advantage of judging testimony is concerned. This court has, as the judge below had, nothing but printed testimony. Neither has any light, save from the inanimate type, and to that we must refer to decide whether the judge abused a discretion." It then proceeded to examine

the record, and reached a conclusion upholding the ruling of the judge who granted the motion, on the ground that there was no substantial conflict in the evidence.

Newell v. *Whitwell,* 16 Mont. 243, 40 Pac. 866, is in principle, also directly in point. That was an appeal from an order granting a motion to dissolve an attachment based exclusively upon affidavits. Recognizing again the general rule, the court there, through Mr. Justice Hunt, used this language: "It must be remembered that the case is not one where the witnesses testified in person, and where the manner in which they gave their evidence might have materially aided the trial judge in weighing their credibility. For this reason the case must be decided by this court precisely upon what was before the district court; that is, upon record evidence, and nothing else." Upon a consideration of the affidavits, the court reached the conclusion that the evidence preponderated against the conclusion of the trial judge, and reversed the order. Again, in *Wilson* v. *Barbour,* 21 Mont. 176, 53 Pac. 315, the appeal was from an order refusing to dissolve an attachment. The motion had been made upon documentary evidence disclosing a substantial conflict. The court nevertheless proceeded, as it had in *Newell* v. *Whitwell, supra,* to determine the merits of the motion, by deciding it upon the weight of the evidence. In *Bordeaux* v. *Bordeaux,* 43 Mont. 102, 115 Pac. 25, the trial court had improperly excluded from the evidence certain letters exchanged between the plaintiff and the defendant. This court, upon concluding that they ought to have been admitted and considered upon the question whether or not the parties had separated by mutual consent, proceeded to give them such probative value as ought to have been accorded to them by the trial court, and determined the rights of the parties accordingly; and this it did upon the theory that it was in as good position to determine the value of the testimony as the trial court would be if a new trial should be ordered.

While, in determining appeals from orders setting aside or refusing to set aside defaults and the like, this rule has not always been consistently observed, nevertheless there is no sub-

stantial ground upon which the propriety or the soundness of it can be questioned. A trial court should not set aside the verdict of a jury, except for cogent reasons—that is, unless the evidence preponderates against it—for the right of trial by jury is a substantial, constitutional one, which should be respected accordingly. (*Orr* v. *Haskell, supra; Sutton* v. *Lowry,* 39 Mont. 462, 104 Pac. 545.) When the ground of the motion is insufficiency of the evidence, or other ground which appeals to the court's discretion, the verdict should not be disturbed, unless a refusal to do so would be to exceed the bounds of reason, all the circumstances being considered. (*Murray* v. *Buell,* 74 Wis. 14, 41 N. W. 1010; *Root* v. *Bingham,* 26 S. D. 118, 128 N. W. 132.) The term "discretion," as used in this connection, denotes "a legal discretion to be exercised in conformity with the spirit of the law and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates." (*Bailey* v. *Taaffe,* 29 Cal. 423.) See, also, *Jensen* v. *Barbour,* 12 Mont. 566, 31 Pac. 592, where the foregoing definition is approved.

When a motion for a new trial for insufficiency of the evidence is submitted to a judge other than the one who presides at the trial, for the very reason that he cannot call to his aid a recollection of the demeanor of the witnesses, he ought not to go further than to determine upon the dead record the question whether there is a decided preponderance of evidence against the verdict or decision. If such is the case, a new trial ought to be granted; otherwise not. On appeal this court will examine the record and determine whether the motion was properly determined. Such is the rule, as was recognized in *Orr* v. *Haskell,* and applied in *Landsman* v. *Thompson, supra.* There is perhaps a limitation of the rule as thus broadly stated, *viz.*, that an order granting a new trial will not be set aside so readily as an order denying one; the reason being that the latter ends the case, so far as the trial court is concerned, whereas the former does not, but merely restores the parties to the same condition

in which they were before the trial. Since the enactment of section 6253 of the Revised Codes, on appeals in equity cases, this court has observed the rule: The findings of the trial court will not be set aside unless there is a decided preponderance in the evidence against them; and, when the evidence as it appears in the record, fully considered, furnishes reasonable grounds for different conclusions, the findings will not be disturbed. (*Bordeaux* v. *Bordeaux,* 32 Mont. 159, 80 Pac. 6; *Finlen* v. *Heinze,* 32 Mont. 354, 80 Pac. 918; *Watkins* v. *Watkins,* 39 Mont. 367, 102 Pac. 860; *Copper Mt. Min. Co.* v. *Butte & C. C. & S. Co.,* 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540; *Reid* v. *Hennessy Merc. Co.,* 45 Mont. 383, 123 Pac. 397; *Leveridge* v. *Hennessy, supra*). In the last case an order granting a new trial, made by a judge other than the trial judge, was reversed as already noted.

Since this case came before Judge Clark upon the same record as that before us, there can be no sound reason why he should not have been governed, in his review of it, by the rule observed by this court on appeal, and the propriety of his action be determined accordingly. The same presumption may not attach to his ruling as would attach if he had heard and observed the living witnesses. "Where the reason is the same the rule should be the same"; but "when the reason of a rule ceases so should the rule itself." (Rev. Codes, secs. 6179, 6178.)

As we view the evidence, the vital question in the case is whether the deed to the bank was intended as additional security for Finch's indebtedness to the bank, or as a final discharge of it; for there is no evidence to justify a finding that the deceased purchased without notice of Finch's claim. Though she [2] paid full value, she accepted a quitclaim deed. This conveyed to her only such title as the bank had. (*Wetzstein* v. *Largey,* 27 Mont. 212, 70 Pac. 717.) But, aside from this, the evidence shows affirmatively that, before the purchase was consummated, one Truesdale, who acted as agent for the deceased and conducted the negotiations for her, interviewed Finch, ostensibly to ascertain whether he asserted any claim to the land. In that interview Finch told Truesdale, in substance, that he owned the

land subject to the mortgages held by the bank. He testified that he told Truesdale all the facts showing the relations of the bank to the title, including the fact that, though he had executed a deed to the bank, he held the title in his own name. Truesdale denied that he was informed by Finch of the existence of the deed; but the fact remains undisputed that he was informed of Finch's claim and the nature of it, and that he communicated this information to the deceased. Furthermore, soon after the purchase was consummated, the deceased instituted this action. The original complaint was for a formal foreclosure of the assigned mortgages. In the first count therein, which declared on the older mortgage, it was alleged: "That the condition of the said mortgage has been broken, in that the defendant Charles L. Finch has wholly failed to pay the said note or the interest on said note secured by said mortgage, and the said defendant is thereby indebted to plaintiff on said note and mortgage in the sum of $4,413.50, with interest thereon at the rate of one per cent per month from the 21st day of January, 1911." A like allegation is found in the second count. In the third count recovery was sought for the amount of the fourth note, together with $87.25, advanced by the bank for the payment of taxes for the years 1905 and 1906, with interest thereon, with a foreclosure of Finch's equity in the portion of the land covered by the patent. The verification was by the deceased upon her personal knowledge. The prayer demanded not only a personal judgment against Finch, but a deficiency judgment in case the amount due should not be fully satisfied by the sale of the property. Taking all these facts together, it is impossible to reach any other conclusion than that the deceased had full knowledge, not only of the claim of Finch, but also of its nature. It cannot be conceived that one who believes he holds title to property free from encumbrances or outstanding equities, can fall into such a mistake as to his rights as did the deceased when she filed the original complaint. And the presumption against her claim is strengthened by the fact that the record does not disclose any explanation as to why she brought the action as she did. Of course, if her claim, as now made, were well founded, it would

be wholly unnecessary to inquire what were the relations between Finch and the bank. She would come within the protection of the statute. (Rev. Codes, sec. 5750.) As the case stands, she falls clearly within its exception.

The evidence on the main issue is not altogether free from doubt, but, viewed as a whole, we think it preponderates decisively against the finding of the trial court. The evidence [3] tending directly or indirectly to sustain Finch's claim may be summarized as follows: The relations of Finch to the bank had their inception in the several loan transactions referred to in the statement. He testified that, about the time he executed the note, he had come to the conclusion that he had not been successful in his farming operations, and for this reason it would be better to lease the land and allow the rentals to be paid to the bank to be applied, first, to the payment of taxes and other charges, and then to the discharge of his indebtedness. He was then solicited by the officers of the bank to exccute the deed, the claim being that this would be a better security than the mortgages, and would leave Finch in a better position to follow some profitable pursuit elsewhere. He agreed to do this upon the condition that the bank would give him a written defeasance. This, Mr. Gohn, the cashier of the bank, and who acted for it, agreed to do. Though the deed was executed and delivered, the defeasance was not. Finch did not insist upon having it, because, as he says, he trusted Mr. Gohn's assurances, when he subsequently demanded it, that the bank would not take any advantage of him. The understanding was that, apart from the change in the form of the security, the relation of mortgagor and mortgagee between himself and the bank would remain unchanged, he being at liberty at any time to discharge the indebtedness and redeem the land, or sell it to any purchaser he might find. The bank kept the notes uncanceled, collected the rents, paid the taxes, and credited the balance upon the indebtedness, keeping an account under the title "C. L. Finch, Rental Ac." When the transfer was made to the deceased, with the notes and mortgages, the notes, except the smaller one, showed, by memoranda attached, the amount of principal and interest due to

December 31, 1910. The memorandum attached to the oldest note contained the notation: "Secured by first mortgage." The second note had attached to it a similar memorandum, reciting: "This note is secured by mortgage sent you for $1,772.25, which mortgage also secures a note for $145.00 of Finch and Stafford, which note has been paid, out of rental account; hence the note No. 587, $1,627.25, is the only one to be considered in connection with this mortgage." The small note bore upon its face the notation: "Pd. 12—30—1910"—and a memorandum attached recited: "This note credited and charged Finch Rental Ac. Dec. 29 (30) 1910." There are other similar circumstances disclosed by the books of the bank which, taken with the foregoing recitals, point strongly to the conclusion that the transactions between it and Finch were never regarded as having been merged in a settlement and discharge of Finch, but that he was regarded all the while by the bank as still its debtor. This conclusion is fortified indirectly by the fact that on February 8, 1911, within a month from the date of the transfer to her, the deceased instituted this action to foreclose the mortgages. This fact furnishes a presumption that she regarded herself, upon the information received from the bank, as being substituted in its place as mortgagee. It is further indirectly fortified by the fact that, while the officers of the bank who conducted the transaction with Finch must be presumed to have been men of experience and business capacity, and knew the rights of the bank, they, nevertheless, just prior to the transfer to deceased, had employed an attorney to bring an action for the foreclosure of the mortgages. Added to these circumstances is the fact that, at the time the deed was executed to the bank, no consideration was paid for it to Finch, either in the form of direct payment or by a credit upon his indebtedness to the bank. On the other hand, Mr. Gohn, the cashier, and Mr. Smith, the accountant of the bank, who overheard a part of the negotiations, both testified that Finch executed the deed in order to discharge his indebtedness to the bank, and to avoid the expense of foreclosure, without any reservation except to exact a promise from Mr. Gohn that the bank would not sell the land to the defendant Adelene Vian Finch, the reason being

that, though Finch had theretofore cohabited with her and held her out as his wife, she was not, in fact, such, and for this reason, and because of his enmity toward her, growing out of their separation, he did not desire her to acquire the property. Both testified that this promise was made in writing, but that the writing was not signed. As to why the bank retained the notes and mortgages, both explained that the purpose was to enable the bank to foreclose the mortgages and thus forestall any claim to dower in the land by Adelene Vian Finch, in the event she appeared to be Finch's lawful wife; she having refused to join in the deed. This explanation, if true and accepted as satisfactory, so far as concerns the first mortgage, because at the time of its execution Finch was admittedly a single man, does not explain the retention of the second mortgage and the notes secured by it. After Finch removed his residence to Silver Bow County, he did not again visit the bank, nor did he make any inquiry of it as to the condition of his indebtedness to it. Mr. Smith explained that the account of the bank was kept as it was in order that the actual cost of the land to the bank might at any time be ascertainable. Neither he nor Mr. Gohn offered any explanation of the fact that credits were indorsed on the notes, and that they were otherwise treated as if they represented continuing liabilities against Finch. Both explained that they were transferred to the deceased in order that she might use them to cut off the possible claim by Adelene Vian Finch. But that deceased did not so understand the transaction is clear, because, as above stated, in her original complaint she sought to charge Finch personally for the amount of the notes, and sought a deficiency judgment for any balance of the amount not satisfied by a sale of the land. There was some evidence as to the value of the land both at the time the deed was executed and at the time of the trial. At the date of Finch's deed, its value was not largely in excess of the amount of his indebtedness; at the date of the trial its value had greatly increased. On the whole, while it must be admitted that Finch's conduct subsequent to the execution of his deed is not altogether consistent with his testimony given at the trial, it is impossible to harmonize the

admitted facts, as shown by the records of the bank and the conduct of its officers, with any other theory than that Finch's deed was not intended by him, nor accepted by the bank, as a conveyance of the title in payment of his indebtedness, but was intended and accepted as an additional security. The conclusion cannot be avoided that the bank retained the notes, not for the purpose stated, but as representing continuing liabilities; otherwise the giving of the deed operated as a discharge of them, as well as the mortgages themselves, and none of them could thereafter be made the basis of legal proceedings for any purpose. Judgments could not be secured upon the notes as against Adelene Vian Finch, because she had not signed them. Having been paid, they represented no valid claim against Finch.

The rule applicable to this class of cases is stated by Mr. Devlin in his work on Deeds, as follows: "If the indebtedness remains uncanceled, the conveyance (absolute deed) is treated in [4] equity as a mortgage, though the grantee may not regard it as such; but he cannot hold the absolute title without at the same time relinquishing the right to compel payment on the deed." (2 Devlin on Deeds, sec. 1120; see, also, *Marshall* v. *Thompson*, 39 Minn. 137, 39 N. W. 309; *Simpson* v. *First Nat. Bank*, 93 Fed. 309, 35 C. C. A. 306; *Harmon* v. *Grant's Pass Banking etc. Co.*, 60 Or. 69, 118 Pac. 188; *Sutphen* v. *Cushman*, 35 Ill. 186; 2 Jones on Mortgages, 325; 27 Cyc. 1011, 1012.) [5] The burden is upon him who alleges that a deed absolute on its face is a mortgage to establish the fact by clear and convincing evidence. (*Gassert* v. *Bogk*, 7 Mont. 585, 1 L. R. A. 240, 19 Pac. 281.) Yet this burden is, we think, fully sustained when it is made to appear that the debt secured remains uncanceled, and is treated as an existing indebtedness, and the relations of the parties remain unchanged after the delivery of the [6] deed. If it appears that the antecedent debt has been canceled, or it is agreed upon the execution of the deed that this is to be done, the retention of the evidence of the debt by the mortgagee is subject to explanation. (*Larson* v. *Dutiel*, 14 S. D. 476, 85 N. W. 1006; *Harmon* v. *Banking Co., supra.*) When, however, the mortgage indebtedness is left uncanceled, and is held

by the mortgagee as a liability against the mortgagor, and proceedings are instituted to enforce it, no explanation can suffice to forestall the conclusion that the relation between the parties of mortgagor and mortgagee theretofore established remains unchanged. Whether the debt has been discharged is one of the crucial tests by which the rights of the parties are to be determined. (*Harmon* v. *Banking Co.* and *Sutphen* v. *Cushman, supra.*)

The order is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

BEST MANUFACTURING CO., APPELLANT, *v.* HUTTON, RESPONDENT.

(No. 3,358.)

(Submitted March 19, 1914. Decided April 8, 1914.)

[141 Pac. 653.]

Contracts—Sales—Acceptance—Waiver of Defects—Warranties—Breach—Pleading—Counterclaim—Principal and Agent—Appeal—Notice of Intention—Presumptions—Bills of Exceptions—Settlement—Delivery to Judge—Sufficiency.

Appeal—Notice of Intention—Presumptions.

1. Unless the contrary appears affirmatively from the record on appeal, the presumption obtains that the notice of intention to move for a new trial was filed in time.

Same—Notice of Intention—When in Time.

2. Where the record on appeal did not affirmatively show that counsel for appellant was present when judgment was entered, or that it was entered before an extension of time in which to file his bill of exceptions on motion for new trial and stay of execution were asked for and granted (May 2), and the clerk of the district court on May 6, attempted to advise him (see paragraph 4, *infra*) that the entry had been made two days before, and on May 15 counsel for respondent served formal notice upon him to that effect, appellant's notice of intention to move for new trial, served on May 21, *held* to have been in time (Rev. Codes, sec. 6796).

Same—Notice of Intention—Waiver.

3. If there was untimeliness in filing notice of intention under the circumstances detailed in paragraph 2, *supra*, it was waived by the

conduct of opposing counsel in extending (on June 29) appellant's time to file his bill of exceptions, and entering into a stipulation whereby his time to propose amendments was enlarged.

Same—Entry of Judgment—Service of Notice—Insufficiency.

4. Service of notice of entry of judgment made through the mail on an attorney whose residence was known to the clerk, *held* insufficient under *State ex rel. Cohen* v. *District Court*, 38 Mont. 119, 99 Pac. 139.

Same—Bill of Exceptions—Settlement—Delivery to Judge.

5. Where a proposed bill of exceptions had been handed by the moving party to the clerk of the district court and by him delivered to the judge, with whom opposing counsel had lodged amendments within time so that the judge was in possession of both bill and amendments within ten days after the latter were proposed, the statute (Rev. Codes, sec. 6788) was satisfied, and the fact that appellant's counsel did not personally present them together to the clerk or the judge did not render the method pursued ineffectual.

Contracts of Sale—Acceptance—Waiver of Defects.

6. Where plaintiff agreed to furnish defendant a traction outfit of a certain character and capacity, and the latter contracted, *inter alia*, that continuous use of it for twenty days, or at intervals during that time, should constitute an acceptance waiving all claims for damages, *etc.*, and on receipt thereof the former not only used it himself at intervals during three years for two-thirds of which time he was aware that it did not and could not be made to meet warranties made by the seller, but hired it out and received money for its use and paid part of the purchase price, his acceptance of it was complete.

Same.

7. While an acceptance does not ordinarily waive a breach of warranty, an express stipulation that acceptance should constitute a waiver "of all claims for damages, either upon express or implied warranty," was conclusive, unless in turn waived by the seller.

Same—Acceptance—Waiver—Validity of Stipulation.

8. *Held*, that the provision in a contract of sale of certain machinery to the effect that twenty days' use should constitute an acceptance and waiver of deficiencies, is neither void as a stipulation for liquidated damages (Rev. Codes, sec. 5054) nor obnoxious as a restriction upon the right to have one's claims adjudicated in a court of law, (Rev. Codes, sec. 5056.)

Same—Warranties—Retention of Property—Effect.

9. Parties may, by the express terms of their contract, make the retention of property without complaint, conclusive evidence that a warranty contained therein has been fulfilled to the satisfaction of the purchaser.

Same—Breach of Warranty—Pleading—Counterclaims.

10. A breach of warranty not waived may be pleaded by way of counterclaim to an action on the purchase price, but cannot (with certain exceptions) be relied on as a defense, after acceptance and retention with knowledge of the breach.

Same—Acceptance—Estoppel—Principal and Agent.

11. Where defendant did not, before acceptance by use for twenty days as stipulated in the contract had become a fact, complain to plaintiff's agent that the engine purchased by him was defective but continued to use it even after the agent's alleged assurances that the defects would be remedied, remained unfulfilled, the contention that plaintiff was estopped to claim acceptance by use had no merit, in

view of the provision of the contract that no agent should have any power to vary its terms and conditions.

[As to buyer's risk, see note in 75 Am. St. Rep. 77.]

Appeal—Erroneous Judgment—Final Disposition of Cause by Supreme Court—When.

12. Where it is apparent from the record on appeal that on the showing made by him in the trial court defendant was erroneously awarded judgment and that he submitted to the court and jury all he had to offer in resistance to his adversary's demand, a new trial will be denied and the cause finally disposed of by an order directing entry of judgment for appellant.

Appeal from District Court, Madison County; J. B. Poindexter, Judge.

ACTION by the Best Manufacturing Company against H. F. Hutton. Plaintiff appeals from the judgment in favor of defendant and from an order denying its motion for a new trial. Reversed and remanded, with directions to enter judgment for plaintiff.

Mr. George Y. Patten, for Appellant, submitted a brief, and one in reply to that of respondent, and argued the cause orally.

The failure to give the stipulated notice to appellant at its home office by registered letter was an acceptance of the freighting outfit, and a waiver of all claims for damages under the warranty, and this condition could not be met or waived by any notice to appellant's agent, or any promises made by him. (*Berlin Mach. Works* v. *Midland Coal etc. L. Co.,* 45 Mont. 390, 123 Pac. 396; *Murphy* v. *Russell & Co.,* 8 Idaho, 133, 67 Pac. 421; *Fahey* v. *Esterley M. Co.,* 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; *Furneaux* v. *Esterly M. Co.,* 36 Kan. 539, 13 Pac. 824; *Palmer* v. *Banfield,* 86 Wis. 441, 56 N. W. 1090; *Potter* v. *Lee,* 94 Mich. 140, 53 N. W. 1047; *Burke* v. *Keystone Mfg. Co.,* 19 Ind. App. 556, 48 N. E. 382; *Brown* v. *Russell,* 105 Ind. 46, 4 N. E. 428; *J. I. Case Threshing Machine Co.* v. *Hall,* 32 Tex. Civ. App. 214, 73 S. W. 835; *Kingman* v. *Watson,* 97 Wis. 596, 73 N. W. 438; *Swann* v. *Lowe,* 4 Wills. Civ. Cas. Ct. App. (Tex.) 303, 18 S. W. 789.)

An unauthorized visit of an agent, without the knowledge of the seller, will not amount to a waiver of notice. (35 Cyc. 428;

J. I. Case Threshing Machine Co. v. *Ebbighausen*, 11 N. D. 466, 92 N. W. 826; *Trapp* v. *New Birdsall Co.*, 109 Wis. 543, 85 N. W. 478; *J. I. Case Threshing Machine Co.* v. *Gidley*, 28 S. D. 101, 132 N. W. 711; *Eichelroth* v. *Long*, 156 Ill. App. 108.)

Continued use of the freighting outfit by respondent for over three years, in doing work for himself and others, operated as an acceptance of the outfit, and a waiver of any claim under the warranty. (*Russell* v. *Murdock*, 79 Iowa, 101, 18 Am. St. Rep. 348, 44 N. W. 237; *Nichols-Shepard Co.* v. *Rhoadman*, 112 Mo. App. 299, 87 S. W. 62; *Yeiser* v. *Russell & Co.*, 26 Ky. Law Rep. 1151, 83 S. W. 574; *Woodward* v. *Emmons*, 61 N. J. L. 281, 39 Atl. 703; *Massillon Engine & Thresher Co.* v. *Schirmer* (Iowa), 93 N. W. 599; *Burke* v. *Keystone Mfg. Co.*, 19 Ind. App. 556, 48 N. E. 382; *Thomas Mfg. Co.* v. *Griffin*, 16 Tex. Civ. App. 188, 40 S. W. 755; *Wolf Co.* v. *Northwestern Dairy Co.*, 55 Wash. 665, 104 Pac. 1123; *Osborne* v. *Dwyer*, 13 Ill. App. (13 Bradw.) 377; *Kingman* v. *Watson*, 97 Wis. 596, 73 N. W. 438.)

The contract expressly provided that if the freighting outfit did not do what was claimed for it, respondent should return it to appellant, and the payments previously made would be refunded, and that appellant should under no circumstances incur any further or other liability to respondent for a breach of warranty, or otherwise, and, therefore, respondent could not under any circumstances retain the outfit, and set off damages for breach of the warranty in an action for the purchase price. (*Gaar, Scott & Co.* v. *Hodges*, 28 Ky. Law Rep. 889, 90 S. W. 580; *Massillon Engine & Thresher Co.* v. *Schirmer, supra; J. I. Case Threshing Machine Co.* v. *Hall*, 32 Tex. Civ. App. 214, 73 S. W. 835; *Scott* v. *Vulcan Iron Works Co.*, 31 Okl. 334, 122 Pac. 186; *J. I. Case Threshing Machine Co.* v. *Gidley*, 28 S. D. 101, 132 N. W. 711; *Swann* v. *Lowe*, 4 Wills. Civ. Cas. Ct. App. (Tex.) 303, 18 S. W. 789; *McCormick Harvesting Machine Co.* v. *Hartman*, 35 Neb. 629, 53 N. W. 566; *Burke* v. *Keystone Mfg. Co.*, 19 Ind. App. 556, 48 N. E. 382.)

Messrs. Hartman & Hartman and *Mr. Lyman H. Bennett,* for Respondent, submitted a brief; *Mr. Walter S. Hartman* argued the cause orally.

The provisions of the printed contract relied upon by appellant as foreclosing the right of respondent to assert, as a defense to the action upon notes given for the purchase money for the freighting outfit in question, any breach of the warranty of said outfit are unconscionable and cannot be enforced. They are in violation of sections 5054 and 5055, Revised Codes, and therefore void. (*Deuninck* v. *West Gallatin Irr. Co.,* 28 Mont. 255, 72 Pac. 618; *Greenleaf* v. *Stockton Com. Harvester etc. Works,* 78 Cal. 606, 21 Pac. 369.)

There was a waiver by appellant of the provisions in said printed contract, in that the failure of the freighting outfit sold to respondent to fulfill the terms of the special warranty was known to the agent who sold and delivered the outfit to respondent and who was on the ground for the purpose of ascertaining and testing whether or not the outfit complied with the warranty; that the agent attempted to remedy the defects in the outfit, and make it conform to the special warranty, and when it did not do so from time to time, promised respondent that the company would make it so conform to and fulfill the warranty; that respondent relied upon these assurances of the agent and was excused by the facts shown in the record from serving any formal notice under the provisions of the printed contract, and his continuance in possession of the outfit in apparent contravention of the terms of said printed contract was for the same reason excused, and that his acceptance of the outfit under the facts shown by the record did not constitute a waiver of his right to set up the breach of warranty in a suit for the purchase money as a defense or a counterclaim thereto. (*First Nat. Bank* v. *Dutcher,* 128 Iowa, 413, 1 L. R. A. (n. s.) 142, 104 N. W. 497; *Champion Machine Co.* v. *Mann,* 42 Kan. 372, 22 Pac. 417; *Nichols & Shepherd Co.* v. *Wiedemann,* 72 Minn. 344, 75 N. W. 208, 76 N. W. 41; *Kingman* v. *Watson,* 97 Wis. 596, 73 N. W. 438; *Sandwich Mfg. Co.* v. *Feary,* 40 Neb.

226, 58 N. W. 713; *Canham* v. *Plano Mfg. Co.*, 3 N. D. 229, 55 N. W. 583; *Springfield Engine & Thresher Co.* v. *Kennedy*, 7 Ind. App. 502, 34 N. E. 856; *D. M. Osborne & Co.* v. *Walther*, 12 Okl. 20, 69 Pac. 953; *McCormick Harvesting Mach. Co.* v. *Gray*, 100 Ind. 285; *McCormick Harvesting Mach. Co.* v. *Machmuller*, 1 Neb. (Unof.) 80, 95 N. W. 507; *Elliott* v. *Puget Sound & Central A. S. S. Co.*, 22 Wash. 220, 60 Pac. 410.)

If the provisions of the printed order relied upon by appellant are unconscionable or in contravention of the provisions of the Revised Codes above cited, or did not apply to the special warranty, or if they have been waived by appellant, the rule governing the case at bar is that the buyer of the property of the kind in question has an election of remedies for the breach of the contract of warranty as follows: (a) If he knows of the defect at the time delivery is offered he may refuse to accept the property, insist on due performance, and if further performance is not duly offered, sue for damages for nonperformance, and if he has paid for the property in advance, may recover the amount of money paid thereon as part of the damages. (b) If the contract of sale has been partly performed, he may rescind the contract, restore what he has received and recover what he has paid. (c) He need not rescind or reject the property, however, but may stand upon the contract and relying upon the warranty may take the property offered and sue for the damages caused by the breach, and these damages may be set up in an original suit for damages if he has paid in full, or as a defense or counterclaim to the action, if he is sued for the purchase price. (*North Alaska Salmon Co.* v. *Hobbs, Wall & Co.*, 159 Cal. 380, 35 L. R. A. (n. s.) 501, 113 Pac. 870, 120 Pac. 27; *Elliott* v. *Puget Sound etc. S. & S. Co.*, 22 Wash. 220, 60 Pac. 410; *D. M. Osborne & Co.* v. *Walther*, 12 Okl. 20, 69 Pac. 953.)

MR. JUSTICE SANNER delivered the opinion of the court.

The complaint in this action declares upon three promissory notes executed and delivered by the defendant (respondent here) to the plaintiff (appellant here) for the aggregate sum

of $4,800, besides interest and attorneys' fees. The answer, admitting the execution and delivery of the notes, alleges that they were given on account of the purchase price of a certain outfit consisting of a traction engine and two steel wagons, bought by the defendant for the purpose of hauling freight, and sold by the plaintiff under the warranties that such outfit would be fit and suitable for such purpose and would, if the roads were in good condition for travel and not wet, slippery or covered with snow, haul forty tons of freight between defendant's residence and Norris at the rate of two miles per hour, and not consume over five tons of Red Lodge coal on the trip; that the outfit wholly failed to meet these warranties and, after repeated efforts to make it effective, turned out to be useless and valueless to the defendant. By way of counterclaim, damages in the sum of $8,500 were demanded, consisting of payments made upon the purchase price, loss in contracts and moneys expended in testing the outfit and in the effort to make it respond to the warranties. The reply admits that plaintiff knew defendant's purchase of the outfit was for the purpose of hauling freight between his ranch and Norris, as well as for other purposes, and that it made the warranty above set forth, but avers that said outfit was purchased and said warranty was given under a written order executed October 2, 1908, by the defendant which contained certain express stipulations none of which were complied with by the defendant, and that by reason of such noncompliance the defendant must be held to have accepted said outfit and to have waived the present and all other claims for damages on account of any alleged deficiencies therein.

Upon the trial the court instructed the jury not to consider the items of loss in contracts and moneys expended in testing the outfit because no competent evidence had been presented in support of them. The verdict was for the defendant, fixing his damages at $5,418.00. By stipulation of counsel, this award was stricken from the verdict and it was recorded as simply for the defendant. Judgment for the defendant for his costs was duly entered thereon. From that judgment and also from an order denying its motion for a new trial, the plaintiff has appealed.

1. The defendant presents the question that the appeal from the order denying the motion for a new trial cannot be considered because the notice of intention was not filed in time, and because the bill of exceptions on motion for new trial was not presented for settlement as required by section 6788, Revised Codes. The pertinent facts as we glean them from various parts of the record are these: The verdict was returned on May 4, 1912, and the minutes of court disclose that upon the receipt of the verdict and the discharge of the jury "the plaintiff is now given sixty days' additional time to that allowed by law in which to file affidavits and prepare and file bill of exceptions on motion for new trial." The bill of exceptions as afterward presented for settlement by the plaintiff and as settled by the trial judge, recites that upon the return of the verdict "on application of plaintiff a stay of execution was granted until final disposition of the motion for new trial," *etc.* The judgment bears date May 4, and was therefore presumably entered on the day of the verdict, but the minutes of that day make no mention of the signing or entry of the judgment; hence we cannot determine whether this occurred before or after the order extending time and staying execution, within or without the presence of plaintiff's counsel. On May 6 the clerk of the district court mailed a letter to plaintiff's counsel to the effect that judgment was signed on May 4, and on May 15 counsel for defendant served upon counsel for plaintiff a formal notice of the entry of judgment. The notice of intention to move for a new trial was served on May 21 and filed the next day. The court minutes of June 29 recite: "Comes now W. A. Clark, Esq., of counsel for defendant; whereupon the plaintiff's time for preparing and filing his bill of exceptions on motion for new trial is extended until August 15, 1912." On the last mentioned date the court on application of counsel for plaintiff, further extended the time to September 15, 1912. On September 14, 1912, the plaintiff served on defendant's counsel and delivered to the clerk its proposed bill of exceptions, and thereafter, by stipulation, the defendant was given until November 20, 1912, to propose amendments, and his proposed amendments were on

November 18, 1912, delivered by his counsel to the trial judge to whom the proposed bill of exceptions had been handed by the clerk. On December 23, 1912, the trial judge, of his own motion, set the settlement of the bill of exceptions for January 3, 1913, on which day it was continued until January 15, 1913, when, over defendant's objection, it was settled and allowed.

The claim that the notice of intention was not filed within ten days after notice of the entry of judgment, as required by **[1, 2]** section 6796, Revised Codes, is based upon two propositions: (a) That counsel for plaintiff, by procuring time and a stay of execution, admitted his knowledge of the entry of judgment and waived notice thereof; and (b) the clerk's letter of May 6 operated as such notice. While it is true that a stay of execution assumes a judgment upon which an execution may be issued, it does not follow that a stay cannot be sought before judgment and in anticipation thereof. Arrangements between counsel even before verdict, for an allowance of time in which to file a bill of exceptions on motion for a new trial, or for a stay of execution pending motion for new trial, are not unknown in this state, and whether to be approved or not, neither that course nor the mere asking for time or stay, necessarily implies the presence of counsel at the entry of judgment or actual knowledge of such entry. The presumption is that the notice of intention was served and filed in time, unless the contrary affirmatively appears from the record (*State ex rel. Cohn* v. *District Court*, 38 Mont. 119, 99 Pac. 139); but in the case at bar the record does not affirmatively show that plaintiff's counsel was present when judgment was entered, or that it was entered before the extension of time and the stay of execution were asked. Therefore, to insist that the time within which plaintiff might file notice of intention to move for a new trial, began with the date of the judgment, defendant must rely, not upon the presence and knowledge of his adversary, but upon a technical waiver of the notice of entry, arising out of the mere fact that such extension of time and such stay were procured. We may assume, without deciding, that a waiver did thus arise; yet it was so highly technical in character as to be unavailing

to the defendant, unless he relied upon it, and that he did not rely upon it but waived it in his turn, the record decisively shows. For example: On May 15, 1912, he caused formal notice to be served on plaintiff's counsel, stating that the judgment had been entered and "you are to govern yourselves accordingly"; it is inconceivable that when this notice was served, defendant intended to claim that such notice had been waived. [3] Again: Whatever untimeliness there may have been in filing the notice of intention, was known to defendant's counsel on June 29, and yet on that day one of them appeared in the district court and caused an order to be entered extending plaintiff's time to file its bill of exceptions; and this is a far different thing from a mere assent to such extension before service of notice. Finally: After the plaintiff's bill of exceptions was made up and served, a stipulation was entered into extending defendant's time to propose amendments—a thing wholly useless if there was not a timely notice of intention upon which to base the motion. In *Vreeland* v. *Edens*, 35 Mont. 413, 89 Pac. 735, this court, after indicating that unless the notice of intention is served within the time allowed by law, a new trial cannot be granted, expressed the view that "the giving of the notice of intention in time, or at all, may be waived in various ways by counsel of the adverse party." Some of these ways are, in our judgment, illustrated in the present case.

That the letter of the clerk mailed on May 6, assuming it to [4] have reached plaintiff's counsel, was not a sufficient notice of the entry of judgment, is settled by the decision in *State ex rel. Cohn* v. *District Court, supra.*

As we understand the argument in connection with defendant's [5] second proposition, it is that, although the proposed bill had been handed by the moving party to the clerk and, while awaiting amendments under the stipulation extending the time therefor, had been by the clerk delivered to the judge, and although within the time allowed by the stipulation the proposed amendments were delivered by defendant's counsel to the judge, so that the judge was within ten days after the amendments were proposed, in possession of both the bill and the amend-

ments, the statute (sec. 6788) was not satisfied, because the plaintiff's counsel did not personally present them together to the clerk or to the judge, and because the settlement was taken up, not at the instance of the plaintiff, but upon the court's own motion. In *Girard* v. *McClernan,* 39 Mont. 523, 105 Pac. 224 (followed, *Freeman* v. *Weare,* 42 Mont. 472, 113 Pac. 466), three ways were pointed out in which the statute might be complied with, to-wit: (1) Present the proposed bill and amendments to the judge upon five days' notice to the adverse party; (2) deliver them to the clerk; or (3) deliver them to the judge. Touching these methods it was said: "If the moving party pursues either the second or third remedy above, he is relieved from further responsibility. It is true that there is no procedure provided for the settlement of the bill when the proposed bill and amendments are delivered to the judge himself; * * * but * * * we think the statute clearly implies that the judge shall settle immediately or fix a subsequent date for settlement." It may be conceded that in the present case the lodgment of the proposed bill with the clerk before the time expired for amendment was premature, and that if the defendant's counsel had delivered the original draft of the amendments to counsel for plaintiff, it would have devolved upon the latter to see that the bill with the amendments reached the hands of the judge; but when, as the result of the act of defendant's counsel, the bill and the amendments met in the hands of the judge, the statute was substantially satisfied under the third method above mentioned. The plaintiff was relieved from further responsibility and the action of the judge in fixing a day for the settlement was authorized.

2. The burden of this appeal is that the evidence did not justify submission of the case to the jury and does not support the [6] verdict. Considering only the evidence adduced on behalf of the defendant, which was not materially aided by anything produced on the part of the plaintiff, we learn that the outfit was purchased under a written order signed by the defendant, in connection with the special warranty above described, which was signed by W. O. Miller as agent for the plaintiff company.

The price was $7,300, payable, $500 with the order, $1,500 December 1, 1908, and the balance in subsequent installments. The order contained the following provisions:

"If upon six days' use, this traction freighting outfit fails to do all we claim for it, the purchaser shall give immediate notice to The Best Manufacturing Company at its home office in San Leandro, California, by registered letter, and allow time to send a man to put the same in working order. If it cannot then be made to do good work, the undersigned shall return it at once to The Best Manufacturing Company, at San Leandro, California, and the payment or payments made on this contract, except freight charges one way, shall be refunded.

"The Best Manufacturing Company shall under no circumstances incur any further or other liability on this contract to the undersigned than the repayment aforesaid, either for delay, or loss of time, or loss of work, or loss from any cause by the use or attempted use of said outfit, or for personal injuries received by the undersigned; or any of his employees, from said outfit, or for nonshipment, delay in shipment, or transportation of said outfit, or for damages upon express or implied warranty of said outfit, or upon any other cause of action whatsoever.

"Continuous use of said outfit for 20 days, or use at intervals during 20 days shall be deemed an acceptance of said outfit by the undersigned and such acceptance shall be a waiver of all claims for damages against the said The Best Manufacturing Company upon express or implied warranty, or for or upon any cause of action whatsoever.

"And it is understood that no agent has any power to make any additions to, or vary the terms and conditions hereof."

The outfit arrived at Norris in November, and from there was driven, with some trouble, to defendant's ranch. Arrived at the ranch the defendant and plaintiff's agents set about making a test of it under the special warranty; but this was abandoned on account of the condition of the roads, without any time being fixed for its renewal and without anything said about waiving it. In view of the fact that the defendant would have no use of it until the following spring, it was arranged

and assented to by the company that of the $1,500 stipulated to be paid December 1, 1908, he should and did pay $500. the balance of $1,000 going over to April 1, 1909; and that the interest on the other deferred installments should run from April 1, 1909, instead of from November 15, 1908. In the spring of 1909 the defendant paid the $1,000 put over from the preceding December and used the engine for plowing 440 acres of land belonging to himself and neighbors. In these operations he had trouble keeping up steam. On July 23, 1909, he wrote the company, asking an extension of time to meet an overdue installment, but made no complaint of the outfit. Later in the same year he used the engine for threshing 15,000 to 18,000 bushels of grain, but it was not a success even for that. On inspection by the deputy state boiler inspector in September, the boiler was found capable of developing not to exceed sixty horse-power and was rated to carry 160 pounds pressure. No attempt to haul grain to Norris was made, and about this the defendant testified: "I knew in the fall of 1909 that I could not haul forty tons over the range from my place to Norris; yes, absolutely, and that is the reason I did not try"; but on November 9, 1909, he again wrote the company for an extension of time to meet payments, without any reference to such failure. In February, 1910, he again wrote to the company about an extension, stated his intention to haul lumber with the outfit for the Madison River Power Company, but expressed no dissatisfaction. In July, 1910, he hauled about 44,000 pounds of wool to Norris, but the engine steamed poorly, never made two miles an hour, and consumed much more than five tons of coal. After returning home he did some threshing with the engine and then hired the outfit to one Staudaher at Alder for freight-hauling at $50 per day. On the way over to Alder and while having trouble with the steam, he met Miller and one Yonkers, who undertook to assist. At their suggestion some grate-bars were changed, the flues were cleaned, coal was substituted for wood as fuel and Yonkers took the throttle; but there was no material improvement. After reaching Alder, Staudaher used the outfit for twelve days under the $50 per day arrangement, and for

eighteen days more on a profit-sharing basis; but the defendant says no profit accrued to him because of poor steaming. In 1911 it was used for plowing and for pulling a well-pile, and was inspected again by the boiler inspector, who found that the tubes were leaking because of the style of construction, and he reduced the pressure-rating to 150 pounds. In 1912 it was used on McKay's ranch to raise some casing. No return or offer to return the outfit to the company was ever made, nor was any notice of its failure ever sent by registered mail or otherwise to the home office of the company. The reasons given by the defendant for this are that he had not consulted counsel, and did not fully understand his rights, and had often seen and complained to Miller, who assured him that the company would make good any deficiency.

The inadequacy of this defense would seem to be settled by the decision of this court in *Berlin Machine Works* v. *Midland C. & L. Co.*, 45 Mont. 390, 123 Pac. 396. But it is said by counsel that the provisions above quoted have no application to the special warranty, because the contract is dated October 2, 1908, at Jeffers, Montana, and the warranty is dated October 3, 1908, at Bozeman, Montana. The warranty appears to have been written on a letterhead of the Bozeman Machine Works, which may account for "Bozeman, Montana" in the date line. At any rate, the defendant himself testified: "I think the contract was drawn up; I think they tried to induce me to sign it, but I * * * wanted to wait until the next day to think it over, to talk it over with my son. * * * If I remember right, the next day I still was in doubt about putting so much money into a machine without knowing whether it would do the work. * * * Finally, Mr. Miller and Mr. Crandall made me the proposition that they would guarantee it to haul forty tons at the rate of two miles an hour between my place and Norris. * * * It looked pretty good to me, so I signed the contract the next day. They put the guaranty for forty tons over the Norris road at two miles an hour in a separate writing. * * * Mr. Miller gave it to me when I purchased the outfit. * * * I read the contract over and I suppose I assented

to all of its conditions by signing it." So that the order containing the stipulations above quoted was not given impulsively but with deliberation and knowledge and with distinct reference to the special warranty. This order, in connection with the warranty, became a contract when accepted by the company, and as entered into its terms were clear and explicit. The plaintiff agreed to furnish an outfit of a certain character and capacity, and the defendant agreed that continuous use of it for twenty days, or at intervals during twenty days, should constitute an acceptance. Even-handed justice required the plaintiff to keep its promises, and it equally required the defendant to observe his part of the agreement. (*Murphy* v. *Russell & Co.*, 8 Idaho, 133, 67 Pac. 421.) The question is not whether such stipulations as those under review would measure up to the highest ethical standards, but whether the defendant, having entered into the contract with his eyes open, with a clear perception of its meaning, should be bound by it. It is not a function of the courts to make contracts for private parties, but when private parties freely contract with each other and the terms of their contracts are not unlawful, it is the duty of courts to enforce them. If the defendant expected to stand upon the warranties, his course under the contract was to ascertain whether the outfit could meet the warranties before putting it to other uses; or at least not to use it after ascertaining that it was a failure. He used it not only at intervals during twenty days, but at intervals during three years. For at least two-thirds of that time he was aware that it did not and could not meet the warranties. He kept it, used it, hired it out, received money for its use, paid money on its price; in so doing his acceptance of it was complete. (*Kingman* v. *Watson*, 97 Wis. 596, 73 N. W. 438; *Woodward* v. *Emmons*, 61 N. J. L. 281, 39 Atl. 703; *Massillon E. & Thresher Co.* v. *Schirmer* (Iowa), 93 [7] N. W. 599.) But while an acceptance does not ordinarily waive a breach of warranty (35 Cyc. 430), the parties to this contract specifically agreed that such acceptance should constitute a waiver by the defendant "of all claims for damages, either upon express or implied warranty, or for or upon any

other cause of action whatsoever." Language could go no further. Unless this stipulation is invalid or was waived, its effect was automatic and conclusive. (*Russell* v. *Murdock*, 79 Iowa, 101, 18 Am. St. Rep. 348, 44 N. W. 237; *Yeiser* v. *Russell & Co.*, 26 Ky. Law Rep. 1151, 83 S. W. 574; *Nichols, Shepard Co.* v. *Rhoadman*, 112 Mo. App. 299, 87 S. W. 62; *Scott* v. *Vulcan Iron Works Co.*, 31 Okl. 334, 122 Pac. 186.)

It is insisted by the defendant that the provision in question is void as a stipulation for liquidated damages under section [8] 5054, Revised Codes, and as a restriction upon the right to relief under section 5056, Revised Codes. As to the alleged contravention of section 5054, the argument is directed mainly to the provision that upon a failure and return of the outfit, the company should refund the payments made, with freight one way, and should not be liable for any other or further demand. But as we view the case, this provision is not involved; it may be void under the decision in *Deuninck* v. *West Gallatin Irr. Co.*, 28 Mont. 255, 72 Pac. 618, as urged; if so, the contract stands as though the provision had never been written, and the matter is in nowise affected. The process of reasoning, however, by which it can be held void as in contravention of section 5054, Revised Codes, has no application to the provision that twenty days shall constitute an acceptance and waiver. No argument is adduced in support of the contention that the provision in question is obnoxious to section 5056, Revised Codes. That section reads: "Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract, by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void." Some of the conditions which this section is designed to meet are illustrated in *Randall* v. *American Fire Ins. Co.*, 10 Mont. 340, 24 Am. St. Rep. 50, 25 Pac. 953; *Cotter* v. *Grand Lodge A. O. U. W.*, 23 Mont. 82, 57 Pac. 650; and *Wortman* v. *Montana Central Ry.*, 22 Mont. 266, 56 Pac. 316; and within its purview are also provisions in a contract by which enforceable rights thereunder are lost unless sued upon within a stipulated time. The provi-

sion before us merely provides what shall be deemed an acceptance and waiver, and does not attempt to deny access to the courts or to prescribe a time within which such access may be had for the vindication of whatever rights the defendants might have under the contract. As aptly said in the reply brief: "The question is as to whether the defendant complied with the contract in such a way as to have rights to enforce, not how they may be enforced." It is a well-recognized rule that par-
[9] ties may by the express terms of their contract make the retention of property without complaint conclusive evidence that the warranty is fulfilled to the satisfaction of the purchaser. (*Murphy* v. *Russell & Co., supra.*)

Neither is it correct to say that if the stipulation just considered be valid, it goes only to defendant's right to maintain his counterclaim, and not to his right to resist payment of the purchase price. The situation is exactly the reverse. Under the contract, use of the outfit for twenty days constituted not merely a waiver, but an acceptance and a waiver; if the acceptance had not been made to also constitute a waiver, it would still remain an acceptance. A breach of warranty which has not
[10] been waived may be pleaded by way of counterclaim to an action on the purchase price, but it cannot be relied on as a defense, after acceptance and retention by the purchaser, with knowledge of the breach. (Note to 4 L. R. A. (n. s.) 1167 *et seq.;* note to 35 L. R. A. (n. s.) 501; 35 Cyc. 42). To this rule there are certain apparent exceptions—as where an offer to return would be useless, or where the property has become nonexistent, or where it is wholly worthless for any purpose; but these exceptions have no relevancy here.

Lastly, it is urged that the company cannot claim an acceptance by use, for the reason that Miller had knowledge from personal observation as well as from the complaints of the de-
[11] fendant, that the outfit was deficient, and assured the defendant that the company would make it good. The argument presented in support of this position and the authorities cited to sustain it may suffice to establish a waiver by the company of the clause for written notice; that we do not decide,

because the case does not rest upon it. The facts are that Miller saw the outfit in operation but twice—once in November, 1908, when the test was attempted, and again in the summer of 1910. It cannot be claimed that the attempted test in 1908—abandoned because of the condition of the roads—advised Miller, any more than it advised the defendant, of any essential deficiency; hence if Miller had any such knowledge from personal observation, he must have obtained it in the summer of 1910 after the outfit had been used for more than a year by the defendant. As to the complaints to Miller, the defendant testified that they met about twice a year; he did not complain at all these meetings and he does not show that he made any complaint to Miller or had any assurance from him before an acceptance by use for twenty days had become a fact. Under these circumstances the express provision of the contract that "no agent has any power to * * * vary the terms and conditions hereof" becomes pertinent. (*Collins* v. *Metropolitan L. I. Co.*, 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, 1092.) To this we may add, that the defendant's use of the outfit continued even after it became plain that Miller's assurances were unproductive.

On the whole case we are convinced that neither defense nor [12] counterclaim was or can be sustained. The defendant submitted for the consideration of the court and jury all that he had to offer in resistance to the plaintiff's demand, and no good purpose could be served by a retrial. The judgment and order appealed from are therefore reversed and the cause is remanded, with directions to enter judgment for the plaintiff for the principal and interest due upon the notes set out in the complaint and for such attorneys' fees as the court shall adjudge to be reasonable.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied June 16, 1914.

IN RE ESTATE OF PETERSON. CHELLQUIST ET AL., APPELLANTS, *v.* EUSTANCE, RESPONDENT.

(No. 3,366.)

(Submitted March 21, 1914. Decided April 1, 1914.)

[140 Pac. 237.]

Probate Proceedings — Distribution of Estate — Objections — Wills—Omission of Children—Construction—Intention of Testator—Admissibility of Evidence—Trial—Notice.

Probate Proceedings—Hearing—Notice.

1. Section 7141, Revised Codes, providing that where written notice of a motion is necessary, it must be given five days before the time set for hearing, *etc., held* inapplicable to the trial of an issue raised by a petition for distribution of an estate and objections thereto set for hearing.

Same—Wills—Pretermission of Children—Intention of Testator—Evidence—Admissibility.

2. Under Revised Codes, section 4755, providing that, where any testator omits to provide in his will for any of his children, unless it appears that such omission was intentional, such child must have the same share in the estate as if testator had died intestate, *etc.*, evidence *dehors* the will may be received to ascertain whether the omission was intentional.

[As to admissibility of evidence in case of pretermitted child, see note in 115 Am. St. Rep. 589.]

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

IN RE ESTATE OF MATHILDA PETERSON, DECEASED. Petition for distribution by Ellen S. Eustance, to which George Chellquist and another filed objections. From a decree for petitioner, objectors appeal. Affirmed.

Cause submitted on briefs of counsel.

Mr. Fred. A. Ewald, for Appellants.

Mr. C. H. Benton, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On February 2, 1902, Mathilda Peterson died, leaving a will which designated Amandus J. Chellquist, her son, and Ellen S.

Eustance, her daughter, as sole devisees. At the time the will was executed, Mrs. Peterson had several other children living, but no one of them is named in the will, and no provision is made for any of them. The daughter, Ellen S. Eustance, was appointed administratrix with the will annexed, and in October, 1912, presented to the district court her final report and petition for distribution. She set forth that she had succeeded to the interest of her brother Amandus J. Chellquist and prayed that the entire property belonging to the estate be distributed to her. Due notice was given that the report and petition would be heard on November 6. On November 4 George and Bert Chellquist, sons of the deceased, filed their written objection to the distribution of all the property to Ellen S. Eustance, upon the ground that, being children of the deceased not named or provided for in the will, they should share in the estate as though the deceased had died intestate. On February 12, 1913, counsel for the administratrix gave personal notice to the attorney for the objectors that on February 15 the issue raised by the petition and objection, *viz.*, whether Mathilda Peterson intentionally omitted to name or provide for the objectors in her will, would be tried by the district court. On March 25 a decree of distribution in conformity with the prayer of the petition was rendered and entered, and the objectors appealed.

Some technical questions of practice are raised, but they are not entitled to serious consideration. The only issue presented by the objectors was their right to participate in the estate, and that was presented by the petition for distribution and the written objections thereto. When an issue is thus raised in a probate matter, it is to be tried and determined as an ordinary civil action (Rev. Codes, secs. 7711, 7714, 7398), except that a jury trial is a privilege, and not a matter of right (section 7715). Complaint is made that the notice provided for in section 7141 [1] was not given to objectors before the trial was had on February 15, but counsel is mistaken in assuming that section to be applicable to the situation presented here. The notice there mentioned is a notice of a motion. The issue formed by the petition for distribution and the written objections thereto was

for trial before the court, and we do not know of any rule of law or practice which requires that any fixed period of time shall intervene between the day upon which a cause is set for trial and the day of the trial. If the objectors were not ready on February 15, they should have asked for a continuance, and their failure to do so constituted a waiver of any objection on their part to the date set for the trial.

The record is apparently not complete. The appeal is sought to be presented upon the judgment-roll, but there is not any proper certificate. The certificate attached contains a great many recitals which the clerk has no authority to make, but fails to state that the papers enumerated constitute the judgment-roll. For a discussion of questions of practice in probate matters, see *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38.

An important question, and one of first impression in this jurisdiction, is presented for determination, *viz.*: Could the trial [2] court receive evidence *aliunde* the will that the testatrix intentionally omitted reference to, or provision for, any of her living children other than the two who were named in the will? Section 4755, Revised Codes, reads as follows: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." The clause "unless it appears that such omission was intentional" suggests the inquiry before us: How may such intention be made to appear? Is the trial court limited in its inquiry to the will itself, or may evidence *dehors* the will be received? In the absence of any adjudications, we might find some indication of legislative intention in cognate provisions of our Codes. In each of the following sections the lawmakers, in unmistakable terms, limited the inquiry to the will itself as the exclusive source of information respecting the subjects treated: Sections 4745, 4746, 4747, 4759, and 4760. Section 4764 authorizes the court to resolve any uncertainty arising on the face of

the will, by reference to other provisions, taking into consideration the circumstances under which the will was made, exclusive of the testator's oral declarations. Similar provisions are found in section 4786. Section 4757 provides that, if the children omitted from the will have received their portions of the estate during the testator's lifetime by way of advancements, then they shall not take anything by virtue of section 4755 above. It would seem very clear that evidence *dehors* the will might be received to show whether the pretermitted children had received advancements, and, if so, to what extent. When the legislature intended to limit the court's inquiry to the will itself, it experienced no difficulty whatever in manifesting that intention in plain, terse English, and the fact that no such restriction is imposed by the clause quoted from section 4755 above, would seem to suggest that it was the purpose of the legislature to leave the trial court free to ascertain the intention of the testator from any competent evidence, extrinsic as well as intrinsic.

Many of the states have statutory provision similar to our section 4755, above. Washington, Oregon, Missouri, New Hampshire, Rhode Island, and Tennessee each has a statutory provision on the same subject, but in each instance it is mandatory in form that, if the child is omitted from the will, it takes as though the testator died intestate. Under such a statute, the will alone can be consulted, and the reason for the rule is manifest. (*Bower* v. *Bower*, 5 Wash. 225, 31 Pac. 598; *Gerrish* v. *Gerrish*, 8 Or. 351, 34 Am. Rep. 585; *Bradley* v. *Bradley*, 24 Mo. 311; *Gage* v. *Gage*, 29 N. H. 533; *Chace* v. *Chace*, 6 R. I. 407, 78 Am. Dec. 446; *Burns* v. *Allen*, 93 Tenn. 149, 23 S. W. 111.) Prior to 1836 the Massachusetts statute was also in terms mandatory, but after the enactment of that year the statute contained this clause: "Unless it shall appear that such omission was intentional and not occasioned by any mistake or accident." Under the amended statute it has been held uniformly since *Wilson* v. *Fosket*, 6 Met. (Mass.) 400, 39 Am. Dec. 736, that evidence *dehors* the will may be received to ascertain whether

the omission was intentional. The clause found in the statutes of Nebraska, Maine, Iowa, Michigan and Wisconsin is substantially the same as that quoted above from Massachusetts, and the same rule prevails in those states. (*Brown* v. *Brown,* 71 Neb. 200, 115 Am. St. Rep. 568, 8 Ann. Cas. 632, 98 N. W. 718; *Whittemore* v. *Russell,* 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197; *Lorieux* v. *Keller,* 5 Iowa, 196, 68 Am. Dec. 696; *In re Stebbins' Estate,* 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159; *Moon* v. *Evans' Estate,* 69 Wis. 667, 34 N. W. 20.)

It will be observed that the words "and not occasioned by any mistake or accident," found in the statutes of the last-named states, including Massachusetts, are omitted from ours. California, North Dakota and Utah each has a statute like our own. Because of this difference in the language between the statute of Massachusetts and its own, the supreme court of California reached the conclusion that a different rule should prevail, and held extrinsic evidence inadmissible to show that the omitted children were purposely omitted. (*In re Garraud's Estate,* 35 Cal. 336.) In *Coulam* v. *Doull,* 4 Utah, 267, 9 Pac. 568, upon the same statute the Utah territorial court reached the contrary conclusion, and upon appeal to the supreme court of the United States, the judgment of the Utah court was affirmed. The decision in *Garraud's Estate* was severely criticised, and it was pointed out that the addition of the words "and not occasioned by any mistake or accident" does not change the effect of the statute; that the same rule would have been applied in Massachusetts if those words had not been added; and that, since the Massachusetts statute is the parent of all these others, and had received construction in *Wilson* v. *Fosket* before it was adopted in California or Utah, that construction should be entitled to great consideration, if, indeed, it should not be held controlling. (*Coulam* v. *Doull,* 133 U. S. 216, 33 L. Ed. 596, 10 Sup. Ct. Rep. 253.) The supreme court of North Dakota has likewise followed the Massachusetts doctrine. (*Schultz* v. *Schultz,* 19 N. D. 688, 125 N. W. 555.) In the consideration

of a statute anything like ours, the California court stands alone in its position.

From the standpoint of sound reasoning, as well as the weight of authority, we adopt the Massachusetts rule, and hold that, in receiving oral evidence of the intention of Mathilda Peterson to omit any reference to her children other than the two named in the will, the trial court did not err.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

WILLOBURN RANCH CO., RESPONDENT, *v.* YEGEN ET AL., APPELLANTS.

(No. 3,370.)

(Submitted March 24, 1914. Decided April 11, 1914.)

[140 Pac. 231.]

Trusts—Reconveyance of Trust Property—Complaint—Sufficiency—Estoppel—General Denial—Corporate Capacity—Issues—Immaterial Variance.

Trusts—Reconveyance of Trust Property—Complaint—Sufficiency.

1. Under the doctrine that whatever is necessarily implied in, or reasonably to be inferred from, an allegation, is to be taken as directly averred, complaint in a suit to compel a reconveyance of trust property on the ground that the purposes of the trust had been fully accomplished, *held* to allege facts from which it was fairly inferable that the trustee had been fully reimbursed for all advancements made by him, and hence, though perhaps vulnerable to a special demurrer because indefinite and ambiguous, was sufficient as against a general objection to the introduction of evidence.

Same—Defenses—Pleading—Estoppel.

2. Where, in an action to compel a reconveyance of certain trust property on the ground that the purposes of the trust had been fully accomplished, defendant in his answer recognized the original contract by which the trust was created and the property conveyed as valid, but set up title to the property by virtue of a subsequent contract, he could not thereafter contend that the original contract was void because not in writing.

Equity—Fraud—Jurisdiction.

3. A court of equity will interpose its power to prevent the consummation of a fraud.

Corporations—General Denial—Issues.

4. A general denial of all the allegations of the complaint not specifically admitted or denied did not put in issue the corporate capacity of plaintiff; hence error in admitting a certificate issued by the office of the secretary of state that a copy of the articles of plaintiff corporation had been filed therein, from which his signature was omitted, was nonprejudicial.

Trial—Immaterial Variance.

5. Immaterial variances not affecting the substantial rights of the parties will be disregarded on appeal.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by the Willoburn Ranch Company against Christian Yegen and Peter Yegen. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Affirmed.

Mr. F. B. Reynolds, for Appellants, submitted a brief and one in reply to that of Respondent, and argued the cause orally.

In behalf of Respondent, *Mr. M. J. Lamb* submitted a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This cause was heretofore before this court on appeals from a judgment by default against the defendant Peter Yegen, and from an order denying a motion to set aside the default. (*Willoburn Ranch Co.* v. *Yegen*, 45 Mont. 254, 122 Pac. 915.) The judgment and order were reversed on the ground that the complaint was insufficient, in that it did not set forth that the purpose for which the trust was created had been accomplished. The plaintiff thereupon filed an amended complaint to supply the omission suggested, and also to make more definite and specific the allegations showing the amount of money received and paid out by defendant Christian Yegen from rents and profits of the property in his hands, or from the proceeds of sales thereof, and what amounts had been advanced by him from his own funds.

The facts alleged in the amended complaint may be summarized as follows: On or about April 1, 1899, one G. W. Connick entered into a contract with E. G. Bailey, by the terms of which he agreed to purchase from Bailey a section of land in Yellowstone County, together with ninety shares of stock in the High Line Ditch Company, agreeing to pay therefor $7,680, as follows: $100 in cash upon the execution of the contract, and the balance in installments of $1,000, payable on April 1 of each year from 1901 to 1906, inclusive, and $1,580 on or before April 1, 1907, each of the installments to bear interest at the rate of seven per cent per annum. Bailey was required to deposit in escrow in the First National Bank of Billings a warranty deed conveying the land and stock to Connick when the purchase price should be fully paid. This Bailey did. The capital stock of the High Line Ditch Company was thereafter doubled, and the number of shares covered by the contract was thus increased to 192. On June 22, 1900, Connick subscribed for 128 shares of stock in the Big Ditch Company, agreeing to pay for it $10 per share, in payments to be made as follows: $256 in cash, and the balance in installments of $256 each, payable on December 22 of each year thereafter, from 1901 to 1904, inclusive. Each of these installments was to bear interest at the rate of eight per cent per annum. At that time all of the stock of this company was in the possession of the First National Bank of Billings, and held by it as security for moneys advanced to the Big Ditch Company under an arrangement by which each subscriber was to receive the shares subscribed for, upon full payment of the subscription price. On December 26, 1902, Connick, not being able to meet his payments as they came due under his contract with Bailey, or the installments due upon his subscription for the stock, made an agreement with Christian Yegen by which he transferred to Yegen his interest under the Bailey contract and in the stock of the Big Ditch Company, Yegen undertaking to meet the installments of the purchase price and stock subscriptions from time to time as they fell due. Connick was by the terms of this agreement to remain in possession of the land

and cultivate it, but was to yield to Yegen the profits derived from it, to be used by the latter in reimbursing himself *pro tanto* for the funds advanced to discharge Connick's obligations. Upon such sums as were advanced by Yegen, he was to be allowed compound interest at the rate of twelve per cent per annum until he had been fully repaid by Connick. This agreement covered also all the personal property on the land, including work stock, farming implements, *etc.* When Yegen had been fully repaid he was to convey to Connick all of the property remaining in his hands. When the agreement was made, Bailey substituted in place of the deed theretofore deposited with the bank, another running to Yegen. On May 5, 1906, at the request of Connick, Yegen conveyed 320 acres of the land to Daniel Pratt and I. D. O'Donnell, together with fifty-six shares of stock in the Big Ditch Company, and one hundred shares of stock in the High Line Ditch Company, for the sum of $14,400. All of this sum was retained by Yegen and was used by him to carry out the purposes of the trust. The result of this transaction was that the amounts due from Connick upon his contract with Bailey and upon his subscription for the stock of the Big Ditch Company, with interest thereon, was fully paid off and discharged by Yegen. The Bailey deed was delivered to Yegen, and also certificates for seventy-two shares of stock in the Big Ditch Company. On October 30, 1907, at Connick's request Yegen transferred to Robert Connick and others 140 acres of the land, together with twenty shares of the stock in the Big Ditch Company, and forty-six shares of the stock in the High Line Ditch Company. On December 1, 1907, Connick sold and transferred to the plaintiff his entire interest in the property held by Yegen, with all his rights of action, *etc.*, including his interest in the remaining shares of stock in the Big Ditch Company. At the time this transaction took place the plaintiff demanded an accounting by Yegen of the amounts received and disbursed by him, but failed to secure it until on or about September 14, 1908, when a partial settlement was had. Plaintiff then paid to Yegen $4,174.50. Thereupon Yegen conveyed to it

all the residue of the property remaining in his hands, except the twenty shares of stock in the Big Ditch Company which are the subject of this action. The total of the sums advanced by Yegen from 1903 to 1908, inclusive, amounted to $14,025.08. For compound interest on the various items making up this sum he was, under the terms of his agreement with Connick, allowed $5,043.67. It is alleged that on or about December 4, 1907, Yegen, without knowledge of G. W. Connick or the plaintiff, fraudulently assigned and delivered to his codefendant Peter Yegen the twenty shares of stock in the Big Ditch Company retained by him, without consideration; that Peter Yegen knew that this stock was a part of the trust estate belonging to Connick and knew that Christian Yegen had no authority to transfer the same; that neither plaintiff nor Connick knew of the transfer until some time in the month of June, 1911, and that though repeated demands have been made by plaintiff upon both defendants for the transfer to it of the stock, they have failed and refused to comply. It is further alleged that the stock has at all times been of the value of $100 per share; that each share represents a statutory inch of water; that the defendants' own land which can be irrigated by the water which the owner of the stock is entitled to use; that they have been using this water for the irrigation of their land since May 1, 1907, and that the reasonable value of the use of the stock so made by them, has been and is $200 per year. Plaintiff prays for a decree declaring the defendants trustees for its benefit of the twenty shares of stock; that they be required to transfer it to the plaintiff; and that they be adjudged to pay to the plaintiff, by way of damages for the use of the stock, the sum of $200 per year from May 1, 1907.

The answer denies that the assignment and transfer was made by Connick to Yegen as alleged in the complaint. It denies the allegations touching the subscription by Connick for the shares of stock in the Big Ditch Company, and the value of the use of it by defendants. It admits substantially all the other facts as alleged. It then alleges the following as special defenses: (1)

That by the terms of the agreement by which Connick transferred to Christian Yegen his interest under the Bailey contract, he stipulated that he would repay to this defendant all sums of money advanced by the latter during the life of the agreement; that on or about October 30, 1907, being unable to meet his obligations in this behalf, Connick was in default; that in consideration of a waiver of this default by the defendant, it was agreed by Connick that this defendant should have the stock in question as and for his individual property, and that thereupon this defendant appropriated the stock to his own use and assigned it to his codefendant Peter Yegen; (2) that on September 28, 1908, defendant Christian Yegen conveyed to the plaintiff all the property acquired by him by transfer from Connick which still remained in his hands, except the twenty shares of stock in question, and that the plaintiff accepted the conveyance and thereupon released all claim to the stock, consenting that the same should be held by this defendant as his own. There was issue by reply.

Special issues were submitted to a jury, which returned findings thereon in favor of the plaintiff. The court adopted these findings and made others, sustaining all the allegations of the complaint. It found that by the payment by the plaintiff to Yegen, of $4,174.50 on September 14, 1908, full and complete settlement and discharge was made of all claims due Yegen, including compound interest upon all sums advanced by him; that thereupon Yegen fully accounted to the plaintiff for all property acquired by him from Connick, except the twenty shares of stock; that Connick did not at any time agree that Yegen should retain the stock in consideration of an extension of time by Yegen to enable Connick to reimburse Yegen; and that the plaintiff did not, when it accepted the conveyance from Yegen, or at any other time, release its right to the stock, or agree that Yegen might retain it as his own. It found, also, that Peter Yegen took the transfer of the stock with knowledge that Christian Yegen held it in trust for Connick. The court made and entered a decree directing Peter Yegen to transfer the

stock to the plaintiff, and adjudging that the defendants pay to the plaintiff $200 for the use of it, with interest from the date of the decree, together with costs of the action. Defendants have appealed from the decree and an order denying their motion for a new trial.

Counsel for defendants contend that the complaint does not [1] allege facts sufficient to show that the purpose of the trust has been fully accomplished, and hence does not state a cause of action. It is apparent that Connick had never been vested with the legal title to any of the property, and that the transfer was made to Yegen to serve these purposes: (1) That he might discharge Connick's indebtedness as the installments fell due; (2) that he might have security for such sums as he agreed, and it became necessary for him, to advance to meet the installments, including compound interest at the stipulated rate, to compensate him for his services; and (3) that Connick should have the title conveyed to him when the other purposes had been fully accomplished. It is therefore clear, as was held on the former appeals, that Yegen could not be divested of the title until it was made to appear that he had been fully reimbursed for such advancements as he had made, together with interest at the stipulated rate. The obligations assumed by the parties being mutual, Connick could not demand a transfer to himself without having fully acquitted himself of his obligation to Yegen. The plaintiff, his assignee, stands upon no higher ground. While the complaint is not a model, in that it does not specifically allege that Yegen had been fully reimbursed for his advancements, it is fairly inferable from the facts alleged that this had been done when the action was brought; for upon summing up the amounts advanced by him as alleged, with interest, and deducting therefrom the sums received by him from the sale made to Pratt and O'Donnell, and the amount paid him by the plaintiff at the time of the transfer to it in September, 1908, it is apparent that nothing is due him. The pleading would have been open to seasonable attack by a special demurrer, on the ground that it is indefinite and perhaps ambiguous, but under

the liberal rule "that whatever is necessarily implied in or is reasonably to be inferred from an allegation is to be taken as directly averred" (Phillips on Code Pleading, sec. 352), we think that it is sufficient to withstand attack by a general demurrer, or by a general objection to the introduction of evidence, which was the mode adopted by defendants in this case. At the trial it was not controverted that Yegen had been fully reimbursed. The only issues in the evidence were upon the questions whether Connick had agreed that Yegen might retain the twenty shares of stock in consideration of the indulgence accorded by him to Connick after the latter was in default, and whether, at the time the conveyance was made to plaintiff, it released to Yegen its claim to the stock. Under this condition of the case we should be disposed, if it were necessary to support the judgment, to deem the complaint amended so as to obviate counsel's objection.

Under the Bailey contract, the evidence discloses, Hosea Connick, a brother of G. W. Connick, was the ostensible purchaser.

[2] The real purchaser was G. W. Connick. He was in possession of the land, and was understood by Yegen to be the purchaser and responsible for the payment of the purchase price. When the contract was made with Yegen, Hosea Connick assigned to Yegen in writing his apparent interest under it. Thereupon Bailey, at the instance of G. W. Connick, substituted for the deed to Hosea Connick, which was on deposit in the bank, one in which Yegen was named as the grantee. A written contract was entered into by G. W. Connick and Yegen on December 27, 1902, the terms of which were substantially the terms of the contract alleged in the complaint, except that Connick was to reimburse Yegen for advancements made by him, with interest, on or before the expiration of one year from the date thereof. In this contract no mention is made of the shares of stock in the Big Ditch Company. Connick was permitted to testify, over objection by counsel for defendants, that the contract between him and Yegen was as alleged in the complaint, but was wholly verbal; that it was carried out by Yegen accord-

ing to its terms, except that he did not account for and deliver up to the plaintiff the twenty shares of stock in controversy. He stated that the written contract which was dated December 27, 1902, never became operative because it did not express correctly the terms which had been agreed to, that it was abandoned, and that the whole arrangement was left to rest entirely in parol. Counsel contend that, inasmuch as the complaint declares upon a contract creating an express trust in relation to real property, and the answer denies its existence, it was incumbent upon plaintiff to establish it by competent evidence, *viz.*, by a written instrument embodying all of its terms; otherwise, under the express provisions of the statute (Rev. Codes, sec. 4537), no trust was created. The result is, it is said, that since the contract is alleged as an entirety and is void as to the land, it is void as to the shares of stock—the personalty—also, and hence plaintiff cannot recover. Counsel for both parties discuss in their briefs the question whether the evidence discloses that the intention of the parties was to create an express trust in favor of Connick, or whether the transaction created between them the relation of mortgagor and mortgagee, and a trust resulted in favor of the plaintiff as Connick's assignee, when by its payment of $4,174.50 on September 14, 1908, it fully reimbursed Yegen for his advancements. We incline to the view that the relation sustained by the parties was that of mortgagor and mortgagee; but, as we regard the case it is not necessary to determine what the relation of the parties was. Yegen, after having recognized the contract as valid and having carried it out according to its terms, except to account for the shares of stock in question, now claims that he acquired them as a part of the trust estate, and that they became his own by virtue of an agreement with Connick and a release by the plaintiff. But for the original contract with Connick he never would have been vested with the title to the shares. Now that he alleges and seeks to establish his personal right to them under a subsequent agreement with Connick and a release by the plaintiff, it does not lie in his mouth to say

that neither had any right to them. He must prevail by virtue of this claim or not at all. To declare the original contract [3] void and permit him to retain the stock, and deny plaintiff relief, would be to enable him to consummate a fraud, to prevent which a court of equity will always interpose its power. (*Lynch* v. *Herrig*, 32 Mont. 267, 80 Pac. 240.) If we accept Yegen's own testimony as to the arrangement by which he acquired the stock, the result would be the same. Connick had already paid three installments of the subscription price. Yegen obtained it by a verbal agreement with Connick, separate and independent of the agreement by which Connick's interest in the Bailey contract was transferred to him, by which he paid the balance of the subscription price with the understanding that Connick was to have it upon reimbursing him in the amounts paid, with compound interest.

Stripping the case, therefore, of all matters relating to the Bailey contract, we have left the simple question whether Yegen became legally bound to hold the shares in trust for Connick and transfer them to him when the purpose of the trust had been accomplished. Of this there can be no doubt; for the statute declares: "A transfer may be made without writing, in every case in which a writing is not expressly required by statute." (Rev. Codes, sec. 4594.) Therefore, whether Yegen became the trustee of an express trust or a mortgagee, when the purpose of the agreement had been accomplished he was bound to transfer the shares of stock to the real owner.

In order to show the legal capacity of the plaintiff, its [4] counsel offered in evidence a certificate of the secretary of state that a copy of its articles of incorporation, had been filed in his office. By oversight the secretary of state had omitted to attach his name to the certificate. The court admitted it, but required counsel to procure a properly authenticated copy and file it in the case after it had been submitted, and this was done. This action is assigned as error. There is no merit in the assignment. While the answer contains a general denial of all the allegations of the complaint not

specifically admitted or denied, this was not sufficient to put in issue the corporate capacity of the plaintiff. (*O'Donnell* v. *City of Butte,* 44 Mont. 97, 119 Pac. 281; *First Nat. Bank of Iowa City* v. *Smith,* 44 Mont. 305, 119 Pac. 784.) The capacity of the plaintiff was not in issue. Therefore, assuming that the evidence would have been competent, if an issue as to the capacity of plaintiff had been presented, no prejudice was wrought by the ruling.

Contention is made that there are material variances between the evidence and the allegations of the complaint, and hence [5] that the evidence is insufficient to sustain the findings. For illustration: It is said that while it is alleged that G. W. Connick had contracted with Bailey for the purchase of the land, the evidence shows that he was not a party to the contract, and therefore had no interest under it. It is true that he was apparently not a party to the contract, but it appears that while it ran to his brother Hosea as the ostensible purchaser, it was made for G. W. Connick's benefit; that after Yegen became the assignee of Hosea's apparent rights he recognized G. W. Connick as the real party in interest, and that he made disposition of the land and shares of stock in the High Line Ditch Company as directed by G. W. Connick and for his benefit. From a technical point of view, the evidence does not show that the assignment was made exactly as alleged. Yet it does show what in legal effect was the same thing, *viz.*, that though made by Hosea Connick, it was made for the benefit of G. W. Connick, the real party in interest, and who was recognized as such by Yegen. As already pointed out, however, if we adopt defendant's theory of the transaction touching the shares of the Big Ditch Company stock, it is wholly immaterial as to who were the parties to the Bailey contract or how it was assigned. The fact remains that Yegen acquired Connick's equity in the stock under an agreement that Connick was to have the legal title transferred to him when Yegen had been reimbursed for his outlay in securing it. Again, counsel say that the evidence discloses that Connick

did not in fact subscribe for the stock, but that the subscription was made by I. D. O'Donnell; hence the plaintiff's claim through Connick's assignment is without foundation. The evidence shows that the subscription was made by O'Donnell, but with the understanding with Connick that the latter could pay the subscription price and take the stock; that subsequently Connick paid three of the installments as they fell due, and that it was fully understood between the bank authorities and Yegen that Connick was to have the stock when the price had been fully paid. Indeed, the subscription list held by the bank indicated that Connick was the person to whom the bank looked for payment of the subscription price. The contentions of counsel are too excessively technical to require serious notice. The trial court properly treated the variances as immaterial. (Rev. Codes, sec. 6585.) Several other contentions made by counsel are equally without merit.

The decree and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

McINNESS, RESPONDENT, *v.* REPUBLIC COAL CO. ET AL., APPELLANTS.

(No. 3,368.)

(Submitted March 23, 1914. Decided April 13, 1914.)

[140 Pac. 235.]

Personal Injuries—Master and Servant—Coal Mines—"Working Place"—Definition—Assumption of Risk—Instructions—Harmless Error—Independent Contractor.

Master and Servant—Coal Mines—"Working Place"—Definition.

1. Plaintiff coal miner was injured by the fall of a rock from the roof of a tunnel about seventy feet distant from the place where he had been actively engaged in mining coal and while on his way to secure an empty car for loading. Section 83 of the Coal Mining Code (Laws 1911, Ch. 120) imposes on the miner the duty to inspect and keep safe his "working place." *Held*, that plaintiff's

working place, within the meaning of that Act, at the time of his injury, was the place where he was about to load the coal previously blasted down by him, and not the place in the tunnel where the accident occurred which latter, having been turned over to defendant about three weeks before, had become a traveling way—an appliance for plaintiff's use—which it was the duty of defendant's foreman to inspect.

Same—Assumption of Risk.

2. The risk arising from defendant's failure to discharge its duty to exercise reasonable care to make the tunnel in which plaintiff was injured, a reasonably safe place and to maintain it in that condition, was not one of those the latter assumed, in the absence of evidence that though the danger was obvious he nevertheless, with knowledge of it and appreciation of the risk attending it, and without any assurance from the master that the defect would be remedied, continued to use the way.

Same—Assumption of Risk—Inapplicability of Doctrine.

3. The evidence disclosing that sounding was necessary to detect loose rocks in the roof of a coal mine tunnel used as a passage way by the miners, the fact that plaintiff made a visual examination of the place where he was hurt and found it safe was not sufficient to charge him with assumption of the risk incident to falling rock at that place.

Same—Question of Law—Erroneous Submission—Harmless Error.

4. The submission of the question whether the place where plaintiff was injured was within his working place, if error, was harmless where the court, under the evidence, might properly have instructed them that it was not,—a conclusion arrived at by their general verdict in his favor.

Same—Independent Contractor.

5. A coal miner who, though paid at a certain rate per ton or yard of coal extracted by him, was required to obey the rules and directions of the defendant company, was an employee and not an independent contractor.

[As to duty of mine owners to prevent injury to employees, see note in 87 Am. St. Rep. 557. As to liability of mine owner to employee injured by falling of roof of mine, see note in Ann. Cas. 1912B, 577.]

Appeal from District Court, Musselshell County; Geo. W. Pierson, Judge.

ACTION by Dan McInness against the Republic Coal Company and others. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Affirmed.

Messrs. George F. Shelton, Thos. J. Matthews, Fred. J. Furman, and *A. J. Verheyen,* for Appellants, submitted a brief; *Mr. Matthews* argued the cause orally.

Mr. Alexander Mackel, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover damages for personal injuries suffered by the plaintiff while engaged as a coal miner at Klein, Montana, in the "northeast main entry of mine No. 2," a mine owned and operated by the defendant Republic Coal Company. The defendant Griffin was superintendent in charge of the mine, and defendant Beever, assistant foreman and face boss. From a judgment in favor of plaintiff and from an order denying a new trial, the defendants appealed.

There are not any conflicts in the evidence upon material matters. The plaintiff was employed by the defendant coal company, and paid according to a wage scale agreed upon by the mine operators and representatives of the miners of that district. His business was running an entry or tunnel some twelve feet wide through a blanket vein of coal. In height the tunnel was measured by the thickness of the vein—about five feet nine inches. This tunnel had been driven for a considerable distance, and every two weeks or thereabouts the work was measured up and paid for by the company, at the rate of "73 cents per ton, and $3.25 per yard." In the course of the work of driving this tunnel, a pothole in the roof was passed. So much of the rock in the hole as was loose at the time was taken down, but no timbering or other precautionary measures were resorted to for the purpose of securing it. The roof of the tunnel was considered to be self-supporting, and timbering was not generally employed. At the time of this accident the tunnel had been driven about seventy feet beyond the pothole, and plaintiff had been paid for the work of excavating and mining at that point at least three weeks before the time of the accident. In addition to the work of blasting down the coal, the plaintiff and his coworker were required to load, and the empty cars were usually set out for them at a slant, ninety feet or more from the face of the entry, and the powder for blasting was kept back of the face a distance of about 300 feet, so that to get empty cars or powder,

plaintiff was required to pass out through the entry and under the pothole. On the morning of December 9, 1911, after he had loaded one car, and while he was passing out to the slant for an empty car, a large rock fell upon him from the pothole, causing the injuries of which complaint is made.

1. The first and principal contention of appellants is that they are not responsible for the injury to the plaintiff because the place where he was injured was a part of his "working place," [1] within the meaning of the Coal Mining Code (Chapter 120, Laws 1911). In *Kallio* v. *Northwestern Imp. Co.*, 47 Mont. 314, 132 Pac. 419, we considered somewhat the provisions of that statute, and particularly section 83, which imposes upon the miner the duty to inspect and keep safe his working place; and we held that for an injury received in his working place the miner could not recover if it resulted from his failure to perform the duty imposed by section 83. Respecting the "working place" we said: "We do not know of any precedent or principle by which the working place of a coal miner, which at common law he must keep safe, is precisely defined. * * * The plain meaning of section 83, as it seems to us, is that before he goes to work the miner must examine the place where his work is to be done; if he is about to mine, he must examine the place where his mining is to occur; if he is about to load, he must examine that part of the workings throughout which the duty of loading is to be performed. While he is at work he must keep safe the place where he is working, and whenever he finds it unsafe, whether as the result of his operations or otherwise, he must make it safe, or, if he cannot do that, he must quit the work and report. It is thus apparent that the 'working place' which the miner must under the statute examine and keep safe is a varying area, and that the duty imposed is a positive one." The pertinency of that language is greatly emphasized when we consider it in the light of the facts of that particular case. Kallio was loading coal which had been thrown back seventy or seventy-five feet from the face by the force of the blast. He commenced the work of loading at the farthest

point, and while thus engaged was injured. Necessarily his working place while loading would change as his work progressed until all the coal knocked down by the blast had been removed, when his working place would be at the face of the entry. In the present instance we are not informed by the record how far back in the tunnel the coal was thrown by a blast, but it is wholly immaterial, for the undisputed evidence is that the place where plaintiff was loading the coal into the cars was from sixty-five to seventy feet from the pothole where he was injured. In the *Kallio Case* a liberal construction was given to the language of the Coal Mining Code, to the end that its several provisions might be harmonized and the obvious purpose of the legislature carried out; but nothing said in that case justifies the assumption of these appellants that the language of section 83 above is sufficiently elastic to cover the case presented by their appeals. The tunnel at the pothole, and for many feet in front of and beyond that point, was completed, and the work paid for some time before this accident occurred. It is true that plaintiff was required to make use of that portion of the tunnel to get empty cars, powder and other appliances; but equally was he required to use it in order to get to and from the face where he was actually engaged at his work. To construe the language of section 83, to include in and as a part of the miner's working place, not only the place where he works, but as well the entry ways through which he must pass to and from his work, or for the purpose of getting supplies, would be nothing short of judicial legislation. The term "working place" is not defined by the Act; but a construction in harmony with appellants' view would impose a burden upon the miner which in many instances would require all his time to discharge and prevent his employment being of any profit to himself, or any use to his employer. If the pothole seventy feet from the place where he was loading was within plaintiff's working place because he had to pass that point to secure empty cars and other supplies, then the whole 300 feet between the face and the magazine was likewise within and a part of his working place, because he had to pass through

it to secure powder. Such a construction would result in a perversion of the language of the Act and impose upon the miner a duty incompatible with his work, and one clearly never within the contemplation of the legislature. It is sufficient for the purposes of this case to say that on December 9, 1911, plaintiff's working place while he was loading was at the point where the coal was actually put upon the cars, and while drilling and blasting, it was at the face of the entry.

When the plaintiff had removed the coal from the tunnel at the pothole and the work had been measured up and paid for, that portion became complete, was turned over to the company, and thereafter was a passage or traveling way, the duty of inspection of which was devolved by the Act upon the company's foreman by section 71. As to the miner, this traveling-way was an appliance for his use, but not a part of his working place. (3 Labatt on Master and Servant, 2d ed., sec. 890.)

2. With this principal question solved, the contention that the plaintiff failed to make out a cause of actionable negligence requires very little consideration. The rules defining the master's common-law duty and the extent of the risk assumed by the servant have been iterated and reiterated so often since the decision of *Kelley* v. *Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273, that further repetition is unnecessary. Indeed, counsel for these respective parties do not disagree at all with reference to them, but only as to their application to the facts of this case. Since it was the master's duty to exercise reasonable care [2, 3] to make of this traveling-way a reasonably safe place and to maintain it in that condition, the risk arising from his failure to discharge that duty is not one of the risks which the servant assumed unless the danger was obvious and the servant, with knowledge of the danger and appreciation of the risk attending it, and without any assurance from the master that it would be remedied, continued to use the way. It is true that plaintiff testified that on the morning of the accident as he went in to his work, he made a visual examination of the pothole and found it safe. But his judgment, upon the matter, based upon

that casual examination, was not conclusive. The evidence is that sounding should be resorted to, to detect the looseness of large rocks in such situations, or, as in this instance, to determine with any reasonable degree of certainty whether the rock in this pothole had become loose by reason of the action of the air, water, vibrations caused by blasting, or otherwise, and that this character of examination was not made. The defendants were aware of the existence of the pothole for a sufficient time before the accident to enable them to make a proper examination and repairs. They failed in this duty, and must respond in damages as a consequence. Knowing of the existence of the pothole, section 73 made it their duty to know of the danger, if by reasonable examination the danger would become apparent.

3. The court submitted to the jury the question whether the [4] pothole where plaintiff was injured was within his working place, and by the general verdict the jury found that it was not. The court might properly have directed the jury to the same conclusion, in view of the undisputed evidence of this case; and therefore error, if error, in submitting the question to the jury, was harmless.

4. The contention that plaintiff was not a servant of the com- [5] pany, but an independent contractor, is disposed of adversely to the appellants by the decision in *Allen* v. *Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

COOPER, APPELLANT, *v.* ROMNEY, RESPONDENT.

(No. 3,367.)

(Submitted March 23, 1914. Decided April 15, 1914.)

[141 Pac. 289.]

Libel — Words Actionable Per Se — Misconduct in Office — "Graft" — Malice — Falsity of Publication — Burden of Proof — Nonsuit.

Appeal and Error—Correct Result—Wrong Reason—Effect.

1. If an order granting a nonsuit was properly made, it will be sustained on appeal even though the reasons prompting it were not sound.

Libel—Officers—Words Actionable *Per Se.*

2. Words published concerning an officer which impute to him unfitness to perform the duties of his office or want of integrity in their discharge, are actionable *per se.*

[As to newspaper libel generally, see note in 15 Am. St. Rep. 333. As to what words are actionable *per se,* see note in 116 Am. St. Rep. 802.]

Same—Construction of Language.

3. In determining whether a publication is libelous *per se,* the language must be considered without the aid of innuendo, and construed in its relation to the entire article in which it appears.

Same—"Graft"—Definition.

4. As characterizing the conduct of a public officer, the use of the word "graft" sometimes implies actual theft and always want of integrity, and its publication in this sense in a newspaper article is actionable *per se.*

Same.

5. *Held,* under the above rule, that a publication charging that county commissioners in letting a public printing contract did so without advertising for bids and out of favoritism, with the evident desire "to deflect all possible graft" the publisher's way, and containing a suggestion that a named amount of money was to be "cut up" between the commissioners, if false and unprivileged was libelous *per se.*

Same—Malice—Privileged Publication—Actual Malice.

6. Under the Code definition of libel (Rev. Codes, sec. 3602), malice is not one of its constituents; its presence or absence becomes material only, in an action for libel, as a circumstance affording a basis for increasing and diminishing the amount of recovery, and in cases involving the question of privileged communication.

Same—Privileged.

7. In order to found liability for libel upon a communication *prima facie* privileged, actual and not implied malice must be shown.

Same—Complaint—Sufficiency.

8. *Held,* that a complaint alleging that a libelous publication was false and malicious, alleges in substance that it was false and unprivileged, since, in case of malice, the privilege conferred by subdivisions 3 and 4 of section 3604, Revised Codes, does not exist.

Appeal from District Court, Ravalli County; John E. Patterson, Judge.

ACTION for libel by O. C. Cooper against Miles Romney. Plaintiff appeals from a judgment on order of nonsuit. Affirmed.

Mr. F. C. Webster and *Messrs. O'Hara, Edwards & Madeen,* for Appellant, submitted a brief; *Mr. R. F. O'Hara* argued the cause orally.

The article set forth in the complaint charges a public officer with dishonest and corrupt motives, and with a dishonest transaction in relation to a public or official act; that the charge of graft therein of itself is libelous, and that it was incumbent upon the defendant in this case to prove the truth of the charges or suffer the consequence. (*Craig* v. *Warren,* 99 Minn. 246, 109 N. W. 231.) The headline, "Graft, the Motive?" may be considered with the rest of the article in determining its general character. (*Landon* v. *Watkins,* 61 Minn. 137, 63 N. W. 615.) "Graft," as applied to officials, *etc.,* stands for dishonesty; dishonest gain by reason of public office, or public or private position; irregular and unlawful means of support; the use of office or position for personal gain without rendering a fair compensating service; to steal or swindle. (*State* v. *Sheridan,* 14 Idaho, 222, 15 L. R. A. (n. s.) 497, 93 Pac. 658; see, also, *Quinn* v. *Review Pub. Co.,* 55 Wash. 69, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077, 104 Pac. 181.) That the article complained of imputes dishonesty to plaintiff, a public officer, admits of no argument. It is the accepted rule of the law of libel that "language concerning one in office, which imputes to him a want of integrity, or misfeasance in his office, or want of capacity generally to fulfill the duties of his office, or which is calculated to diminish public confidence in him, or charges him with a breach of some public trust is actionable." (Townshend on Libel, and Slander, 255, 256; *Bettner* v. *Holt,* 70 Cal. 270, 11 Pac. 713; *Gove* v. *Blethen,* 21 Minn. 80, 18 Am. Rep. 380; *Larrabee* v.

Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462; *Augusta Evening News* v. *Radford*, 91 Ga. 494, 44 Am. St. Rep. 53, 20 L. R. A. 533, 17 S. E. 612; *Jarman* v. *Rea*, 137 Cal. 339, 70 Pac. 216; *Tawney* v. *Simonson etc. Co.*, 109 Minn. 341, 27 L. R. A. (n. s.) 1035, 124 N. W. 229.) So, too, it is libelous to impute to anyone holding an office that he has been guilty of improper conduct, or has been actuated by wicked, corrupt or selfish motives. (Newell on Defamation, Libel and Slander, par. 69; *Wofford* v. *Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66, 55 L. R. A. 214, 30 South. 625; *Star Publishing Co.* v. *Donahoe* (Del.), 65 L. R. A. 980, 58 Atl. 513; *Atlanta News Pub. Co.* v. *Medlock*, 123 Ga. 714, 3 L. R. A. (n s.) 1139, 51 S. E. 756; *Woolley* v. *Plaindealer Pub. Co.*, 47 Or. 619, 5 L. R. A. (n. s.) 498, 84 Pac. 473.)

Does the question of privilege enter into the case? We contend that it does not. The article itself does not purport to be a fair, true report, or any report, of a public official proceeding of the board of county commissioners of which plaintiff is a member, nor a statement of any speech, argument or debate in the course of the same. It merely recites its version of the meeting, followed by a tirade of libelous criticism and abuse of the board of county commissioners of which plaintiff is a member. (*Kelly* v. *Independent Pub. Co.*, 45 Mont. 140, Ann. Cas. 1912D, 1063, 38 L. R. A. (n. s.) 1160, 122 Pac. 735; *Neeb* v. *Hope*, 111 Pa. 145; 2 Atl. 568; *Post Pub. Co.* v. *Hallam*, 59 Fed. 541, 8 C. C. A. 201.)

A publication in a newspaper, concerning either a public officer or a candidate for an elective office, which falsely imputes to him a crime, is not privileged, but is actionable *per se*, the law imputing malice to the publisher. (*Moore* v. *Dispatch Printing Co.*, 87 Minn. 450, 92 N. W. 396; *Commonwealth* v. *Clap*, 4 Mass. 163, 3 Am. Dec. 212; *Curtis* v. *Mussey*, 6 Gray (Mass.) 261; *Aldrich* v. *Press Printing Co.*, 9 Minn. 133, 86 Am. Dec. 84; *Secely* v. *Blair*, Wright (Ohio), 355; *Root* v. *King*, 7 Cow. (N. Y.) 613; *King* v. *Root*, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102.)

Messrs. C. S. Wagner, E. C. Kurtz, and *John H. Tolan,* for Respondent, submitted a brief; *Mr. Wagner* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Action for libel. Appeal from a judgment on order of nonsuit. The complaint alleges that on December 10, 1912, the defendant, as editor, proprietor and manager of the "Western News," a newspaper of general circulation in Ravalli county, Montana, did publish of and concerning the plaintiff, a member of the board of county commissioners of said county, the following false and malicious defamation, to-wit:

"Just prior to adjournment the commissioners entered into another contract—with the Hamilton Publishing Company, publisher of the 'Ravalli Republican,' to do and perform the county printing for another period of two years, beginning Jan. 6, 1913, and ending Jan. 6, 1915, at its own price. No bids were called for in this instance, the practice of years being reversed. Knowledge of this transaction involving the letting of this $8,000 contract leaked out quite accidentally. Always heretofore the custom has been to call for bids for the county printing, the largest contract at the disposal of the board. Not so this trip.

"Graft the Motive?

"Behind the revolutionary action of the commissioners, who allowed all other contracts to the lowest bidder after advertising for bids, there appears a very evident motive. It is clear that the commissioners did not desire to let the contract to the lowest bidder, and, fearing a comparison of figures, they arbitrarily awarded the contract without calling for bids, acting secretly in an effort to conceal their action. The interests of the taxpayers, the people who pay the county's printing bills, were never taken into account.

"Why the commissioners should lay themselves open to criticism and condemnation in this way is quite clear. The reason the commissioners did not call for bids, and did not care to save the county money, is that they desired the printing contract to

remain in the hands of the Hamilton Publishing Company, which is generally understood to be controlled by Mr. R. A. O'Hara. And the commissioners, always very partial to Mr. O'Hara, evidently desired to deflect all possible graft and revenue his way. The word 'graft' is used advisedly and very literally, for whenever the county pays more for a commodity to one person or corporation than it could buy the same commodity for elsewhere, the difference is graft—graft of the public's money aided and abetted by the public's servants, the commissioners.

"It is obvious that this printing contract includes a graft of not less than $2,000 per year. Any person may determine this by making a little investigation. Who gets this $2,000 a year? Is it cut up between Messrs. Cooper, Treese and Tillman, or do these gentlemen, merely as an evidence of good nature, permit it to slip through their fingers into the coffers of the mysterious Hamilton Publishing Company?"

It is further alleged, by way of innuendo, that the "commissioners" above mentioned means the board of county commissioners of Ravalli county; that the adjournment referred to is the adjournment of said board on December 7, 1912; that "county printing" means the official printing for Ravalli county; that "Cooper" means the appellant, and "that by the use of the word 'graft' in said publication the defendant intended to convey, and did convey, to the readers of the said 'Western News,' that the plaintiff in his capacity as a member of the board of county commissioners of Ravalli county, Montana, was guilty of a dishonest transaction in relation to a public or official act, which false and malicious defamation tends, and did then and there tend, to impeach the honesty, integrity, and reputation of the said plaintiff, county commissioner as aforesaid, thereby exposing him to hatred, contempt, and ridicule, to his damage in the sum of ten thousand dollars ($10,000.00)."

The answer admits the publication of the article quoted, pleads that it is true, that the publication was without malice, was a fair and true report of the proceedings of a public meeting of the board of county commissioners of Ravalli county held

at Hamilton, on December 7, 1912, in the truth of which he honestly believed, and "that the matter complained of was for the benefit of the public in this, to-wit: That said plaintiff is a public officer of the county of Ravalli, state of Montana, and that the matter published of and concerning him, as alleged in said complaint, was a just and true report and criticism of his public and official acts as county commissioner of Ravalli county, state of Montana, as to the nature and character of the public and official acts of said plaintiff at said meeting."

The reply puts in issue all the affirmative allegations of the answer.

Upon the trial the only evidence produced was to the effect that the plaintiff was at the time of the publication, and still is, a duly elected, qualified and acting member of the board of county commissioners of Ravalli county, and that on December 31, 1912, there appeared in the "Western News" a certain article, the publication of which is claimed to be evidence of malice.

From the grounds of the motion for nonsuit, as well as from certain concessions made by counsel for plaintiff in the argument of the motion, which concessions the trial court caused to be set forth in the bill of exceptions, we assume that the order was made upon the theory that the publication was not libelous *per se,* and therefore plea and proof of special damages were necessary, or else that the complaint shows the publication to have been *prima facie* privileged, and thus to require more evirence of malice and falsity than was presented. We are, however, [1] not concerned with the correctness of the theory upon which the order was made. If proper, it must be sustained, even though the reasons suggested may not be altogether sound.

1. To determine whether the matter complained of was of the character commonly denominated actionable *per se,* we need not go beyond fundamental principles as asserted and maintained [2] by almost unbroken authority. "When language is used," says Newell, "concerning a person or his affairs, which from its nature necessarily must or presumably will as its natural and proximate consequence occasion him pecuniary loss, its publi-

cation *prima facie* constitutes a cause of action, and *prima facie* constitutes a wrong, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; and this is all that is meant by the term 'actionable *per se*.'" (Newell on Slander and Libel, p. 181; Townshend on Libel and Slander, pp. 157, 158; *Brown* v. *Independent Pub. Co.*, 48 Mont. 374, 138 Pac. 258; *Paxton* v. *Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 3 Ann. Cas. 546, 78 Pac. 215.) Of this character are words published concerning a person in office, which impute to him unfitness to perform the duties of such office, or want of integrity in the discharge of such duties. (Newell on Slander and Libel, pp. 69, 168; Odgers on Libel and Slander, p. 297; *Wofford* v. *Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66, 55 L. R. A. 214, 30 South. 625; note to 116 Am. St. Rep. 814, 815.)

In determining whether a publication is libelous *per se*, the [3] language complained of must be taken without the aid of innuendo (*Brown* v. *Independent Pub. Co., supra; Wofford* v. *Meeks, supra;* 25 Cyc. 450); but it must be construed in its relation to the entire article in which it appears, for its ordinary meaning may be limited or changed by the circumstances, or by qualifications expressly annexed to its use. (*Paxton* v. *Woodward, supra;* 25 Cyc. 300 *et seq.*)

The offensiveness of the publication in question is specifically alleged to consist in the use of the word "graft." As ordinarily [4] employed to characterize the conduct of a public officer, that word has a well-understood significance. It implies sometimes actual theft, and always want of integrity. That its use in this sense is actionable *per se* is no longer open to question. (*State* v. *Sheridan*, 14 Idaho, 222, 15 L. R. A. (n. s.) 497, 93 Pac. 658; *Gill* v. *Ruggles*, 95 S. C. 90, 78 S. E. 536; *Quinn* v. *Review Pub. Co.*, 55 Wash. 69, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077, 104 Pac. 181; *Craig* v. *Warren*, 99 Minn. 246, 109 N. W. 231.) While we agree with the defendant that this word must be taken as defined in the article, we do not agree that such definition is

to be found in any single sentence. The article is made up of alleged facts and comments thereon. The facts stated are that the commissioners did a certain thing—not improper, if done in the exercise of their best judgment and discretion—in such a way and under such circumstances as to render it reprehensible. We feel quite certain that no one reading the article could doubt [5] that by the use of the word "graft" the writer meant not merely the difference between what the printing could have been gotten for and what the contract agrees to pay, but it meant that the commissioners had acted in deliberate disregard of the interests of the county and either out of partiality to Mr. O'Hara or out of complaisance toward the Hamilton Publishing Company, or with a view to unlawful profit to themselves. The office of county commissioner is a most important one; it demands the exercise, not only of sound judgment, but of the utmost integrity; it calls for a jealous watchfulness of the finances of the county and in the interest of the taxpayers. To suggest, therefore, that a board of county commissioners has so awarded a public contract that there should result something to "cut up" among themselves is to impute outright dishonesty, and to say that they have deliberately out of favoritism or partisanship ignored the interests of the county, in order that undue profit might accrue to some private person or corporation, is to accuse them of utter unfitness to hold so responsible an office. This, if false and unprivileged, is libel *per se.* (Revised Codes, sec. 3602; *Wofford* v. *Meeks, supra; Schomberg* v. *Walker,* 132 Cal. 224, 64 Pac. 290; *Osborn* v. *Leach,* 135 N. C. 628, 66 L. R. A. 648, 47 S. E. 811.)

2. We say, "if false and unprivileged," for that is the language of the statute. No publication which is not false is a [6, 7] libel; and no publication which is privileged is a libel. With all due deference to *Schomberg* v. *Walker, supra,* we are unable to extract any other meaning from section 3602 of our Code. At the common law the gist of libel is malice, which by a fiction is presumed from falsity, while falsity in its turn is

presumed from the fact of publication. (25 Cyc. 372, 491, 492.) Accordingly, at common law the plaintiff makes a complete case upon showing the publication of matter from which damage may be inferred. In our definition of libel we find no mention of malice; to imply malice from falsehood is useless, because malice is unnecessary. The publisher is liable if his publication be false and unprivileged, though it was made in good faith, from worthy motives, and with the utmost belief in its truth. (*Kelly* v. *Independent Pub. Co.*, 45 Mont. 127, Ann. Cas. 1913D, 1063, 38 L. R. A. (n. s.) 1160, 122 Pac. 735.) The case just cited was decided in rigid adherence to our statute as we are construing it, and the statement which appears in it, to the effect that, because the publication was libelous *per se*, "the law presumes malice in the absence of lawful excuse, even though no spite or ill will is shown," must be taken as an inadvertence. The presence or absence of malice becomes material only as a circumstance affording a basis for increasing or diminishing the amount of recovery, and in cases involving the question of privileged communication. (*Paxton* v. *Woodward, supra.*)

If it be true that, as a constituent of libel, malice has no place, it is equally true that to found liability upon a communication *prima facie* privileged, actual and not implied malice must be shown. Such was the rule at common law (*Coleman* v. *MacLennon*, 78 Kan. 711, 130 Am. St. Rep. 390, 20 L. R. A. (n. s.) 361, 98 Pac. 281; *Press Co.* v. *Stewart*, 119 Pa. 584, 14 Atl. 51; *Myers* v. *Longstaff*, 14 S. D. 98, 84 N. W. 233; *Bacon* v. *Michigan Cent. Ry. Co.*, 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. 324; *Smith* v. *Youmans*, 3 Hill (S. C.), 85; *Hart* v. *Rush*, 1 B. Mon. (Ky.) 166, 35 Am. Dec. 179; *Gray* v. *Pentland*, 4 Serg. & R. (Pa.) 420), and such must necessarily be the rule under our statute, unless we reduce it to a tautological absurdity.

Since, however, the privilege conferred by subdivisions 3 and 4 of section 3604 does not exist if the publication be malicious, [8] a complaint which alleges that such publication was false and malicious alleges in substance that it was false and unprivileged. This much must, however, be alleged in substance, and, if

it must be alleged, it must be proved. (*Yancey* v. *Northern Pac. Ry. Co.*, 42 Mont. 342, 112 Pac. 533.)

In the early stages of development of the law of libel, truth or falsity was of importance only as bearing upon the question of malice. As the outgrowth of judicial antipathy to the rapidly increasing importance of truth as a defense, resort was had to the doctrine that all defamatory matter is *prima facie* false. The task of finding reasons for any product or process of growth is always a thankless one; but the very few authorities which attempt it, so far as the doctrine last mentioned is concerned, ascribe its existence to the presumption that every person is guiltless of crime or wrong. Why this presumption should not have availed to protect the publisher, as well as the person offended, is nowhere elucidated. The plaintiff in a libel suit is doubtless presumed innocent of whatever wrong a publication imputes to him, and the publisher is likewise presumed to be innocent of wrong in making the publication. (Sec. 7962, Rev. Codes.) A presumption is a form of indirect evidence (sec. 7956), and it is valid and effective only until controverted by other evidence, direct or indirect (sec. 7960). So far as presumptions are concerned, the evidence is at equipoise at the very outset of the case. The scales can be made to dip in plaintiff's favor only by the presentation on his part of further evidence. This is but the application to all cases of libel of the generally accepted rule that, where the communication appears to have been privileged, the plaintiff must show, not only actual malice, but falsity in the publication (*Ashcroft* v. *Hammond*, 197 N. Y. 488, 90 N. E. 1117; *Edwards* v. *Chandler*, 14 Mich. 471, 90 Am. Dec. 249; *Briggs* v. *Garrett*, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513; *McIntyre* v. *McBean*, 13 U. C. Q. B. 534), and we see no special hardship in it.

In the view expressed, it becomes unnecessary to ascertain whether the publication in question was privileged, and if so, whether the article of December 31, 1912, was sufficient proof of malice. As the duty devolved upon plaintiff to present some evi-

dence of falsity, and as this was not done, the nonsuit was properly granted, and the judgment must be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied June 16, 1914.

BURLES, ADMR., RESPONDENT, v. OREGON SHORT LINE R. R. CO. ET AL., APPELLANTS.

(No. 3,372.)

(Submitted March 25, 1914. Decided April 16, 1914.)

[140 Pac. 513.]

Railroads—Passengers—Refusal to Stop Train—Exemplary Damages—Evidence—Admissibility—Res Gestae.

Railroads—Flag Stations—Refusal to Stop Train—Exemplary Damages.

1. In an action against a railway company to recover damages for failure to stop its train at a station where it was scheduled to stop when flagged, punitive, in addition to compensatory, damages may be awarded if it is shown that the engineer saw the signal but willfully refused to stop for the purpose of receiving plaintiff as a passenger.

Same—Aggravation of Disease—Element of Damages—Instructions.

2. An instruction that the jury might consider as an element of damages the loss of strength and capacity to resist the ravages of the disease from which plaintiff's intestate was suffering at the time she was compelled to remain for ten hours at a flag station where there were not any accommodations, because of the willful refusal of defendant company's locomotive engineer to stop his train though properly flagged, was properly given.

[As to civil liability for accelerating death of deceased or injured person, see note in Ann. Cas. 1912A, 965.]

Same—Damages—Evidence.

3. Evidence that there were not any accommodations at a flag station at which an invalid passenger was compelled to remain for about ten hours owing to the wrongful refusal of defendant company's engineer to stop his train, was admissible as reflecting upon the probability of plaintiff's claim that she underwent suffering in consequence of being forced to wait at such a place.

Same—Evidence—*Res Gestae.*

4. Evidence that the invalid passenger referred to in paragraph 3 above manifested her suffering by moaning during the tedious wait for the next train, was properly admitted.

Evidence—Preponderance—How Determined.

5. The preponderance of the evidence does not depend alone on the number of witnesses testifying to a fact; but in determining the question the jury should consider the opportunities of the witnesses for seeing or knowing the things about which they testified, their conduct and demeanor while testifying, their interest or lack of interest in the suit, and the probability or improbability of the truth of their statements in view of all the other evidence, facts and circumstances.

Appeal from District Court, Beaverhead County; J. B. Poindexter, Judge.

ACTION by E. L. Burles, as administrator of Goldie May Burles, deceased, against the Oregon Short Line Railroad Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appealed. Affirmed.

Mr. J. L. Wines and *Mr. T. J. Harrington*, for Appellants, submitted a brief; *Mr. Wines* argued the cause orally.

Mr. Lyman H. Bennett and *Mr. J. H. Alvord*, for Respondent, submitted a brief; *Mr. Bennett* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was prosecuted by the administrator of the estate of Goldie May Burles, deceased, to recover damages alleged to have been suffered by her during her lifetime as the proximate result of defendants' refusal to stop train No. 3 at Barrett's Station on June 27, 1910, and carry her to Butte. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appealed.

At the time this cause of action arose, Barrett's was a station on the main line of defendant company's road, and train No. 3, bound for Butte, was scheduled to stop there upon being flagged. On June 27, 1910, that train, in charge of defendant Hughes as engineer, reached Barrett's on time, at 3:42 A. M.

There is not any dispute that this plaintiff and the deceased, his wife, reached the station in time; that the wife was then suffering from some internal hemorrhage, and was on her way to Butte for surgical treatment; that train No. 3 did not stop; that plaintiff and his wife were forced to remain at the section-house at Barrett's for ten hours, until the next train for Butte arrived; that there were no accommodations there; that as a result the wife suffered intensely, her strength and power of resisting the ravages of the disease were greatly lessened, and that she died about the time she reached the hospital in Butte, on the afternoon of the same day. The plaintiff contends in his pleading and evidence that he went upon the track at the station or section-house and when he saw the train approaching, waived his hat until the engineer gave two short blasts of the whistle, the usual signal of recognition of the fact that the flag had been seen, and an indication of an intention to stop, but that in willful disregard of their duty, the defendants did not stop the train, with the consequences enumerated above.

1. The trial court instructed the jury that they might award exemplary as well as compensatory damages if they found that [1] the defendants were guilty of oppression, malice or fraud. Counsel for appellants are mistaken in assuming that section 4325, Revised Codes, limits the recovery, in a case of this character, to actual compensation. That section does not do more than merely declare just what the rule of law applicable in an ordinary negligence action would be in the absence of the statute. (3 Hutchinson on Carriers, 3d ed., sec. 1421; *Thomas* v. *Southern Ry. Co.*, 122 N. C. 1005, 30 S. E. 342.)

It is true that, "as a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance" (sec. 6038, Rev. Codes); but "in any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the

defendant." (Section 6047.) In this action recovery is not predicated alone upon the negligence of these defendants. The theory of plaintiff's complaint and his evidence is that the engineer saw the signal to stop and gave recognition by appropriate blasts of the locomotive whistle, and then, in willful disregard of the rights of the plaintiff and his wife, refused to stop the train. That punitive damages may be recovered under such circumstances is the rule well-nigh universal. (*Arzaga* v. *Villalba*, 85 Cal. 191, 24 Pac. 656; *Wilson* v. *New Orleans & N. E. R. R. Co.*, 63 Miss. 352; *Fell* v. *Northern Pac. R. Co.* (C. C.), 44 Fed. 248; 1 White's Personal Injuries on Railroads, secs. 176, 177; 3 Hutchinson on Carriers, sec. 1440.)

A case very similar in its facts to this one was presented to the supreme court of North Carolina in *Williams* v. *Carolina & W. R. Co.*, 144 N. C. 498, 12 Ann. Cas. 1000, 12 L. R. A. (n. s.) 191, 57 S. E. 216, and upon the question now under consideration the court said: "If the plaintiffs went to the usual place for receiving passengers a reasonable time before the arrival of the train, and were able, ready, and willing to pay their fare, they were entitled to be carried to the next station. (*Phillips* v. *Southern R. Co.*, 124 N. C. 123, 45 L. R. A. 163; 32 S. E. 388; *North Chicago St. R. Co.* v. *Williams*, 140 Ill. 275, 29 N. E. 672; 1 Fetter on Carriers of Passengers, sec. 228.) If they gave the requisite signal, it was the duty of the engineer to stop the train so that they might take passage on it. If he did not see the plaintiffs by reason of mere negligence in not keeping a proper lookout ahead of his train, the defendant would be liable only for actual damages resulting from the failure to stop the train; but, if he did see them, and willfully refused to stop for the purpose of receiving them on the train as passengers, the defendant would be liable to punitive damages, in addition to those which are merely compensatory."

2. Complaint is made of instruction No. 10 in so far as it permitted the jury to consider, as an element of damages, the [2] loss upon the part of Mrs. Burles of her strength and

capacity to resist the disease from which she suffered, so far as that loss was attributable to the wrongful acts of the defendants. While it is true that the defendants were not responsible for Mrs. Burles' sickness, they cannot escape the consequences of their acts upon that score. Section 6068, Revised Codes, provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." If the disease from which Mrs. Burles was suffering was aggravated, or her power of resistance weakened, or her death accelerated by the long and annoying wait at Barrett's and the failure to secure surgical assistance at the earliest possible time, defendants, by whose wrongful acts these consequences were brought about, must respond in damages; and it is wholly immaterial that they did not know at the time of the fact of her illness or the probable, serious consequences to follow from her missing the train. This rule is so universally recognized by the courts and text-writers that a single reference will suffice. (3 Hutchinson on Carriers, sec. 1432, and cases cited.)

3. The trial court did not err in admitting evidence that there were not any accommodations at Barrett's, where Mrs. Burles was compelled to stay for ten hours, or until the arrival [3] of the next train for Butte. If this plaintiff, for instance had been wrongfully put off the train at Barrett's, he could show the surroundings as reflecting upon the extent of the inconvenience he suffered. The same rule is applicable here. Negligence is not predicated upon the failure of the defendants to provide accommodations at Barrett's; but the complaint is made that Mrs. Burles was, by the wrongful acts of the defendants, forced to remain at a place where there were not any accommodations, and evidence of this fact was competent as reflecting upon the probability of plaintiff's story that she suffered in consequence of being compelled to wait at that point and

under the circumstances as they were there presented. (*Williams* v. *Vanderbilt*, 28 N. Y. 217.)

4. Complaint is made that plaintiff was permitted to testify that during the wait at Barrett's his wife manifested her suf-
[4] fering by moaning. The evidence was properly admitted. In Abbott's Mode of Proving Facts, second edition, 345, it is said: "The apparently spontaneous manifestations of present feeling by demeanor, gesture, outcry, moan, tears, and the like, as distinguished from declarations describing feelings, are original evidence."

5. Finally, it is insisted that the evidence is insufficient to justify the verdict. It is not controverted that plaintiff gave a proper signal to stop the train; but it is most earnestly urged upon us that the evidence is overwhelmingly preponderant that the engineer did not see it and could not have seen it under the circumstances of the case as narrated by the plaintiff, and that no answering signal was given. It is true that the engineer, the fireman, and brakeman on the train at the time each testified that the stop signals—two short blasts of the whistle—were not given, and the engineer, fireman, and two other employees of the company expressed opinions that a person in the situation of the plaintiff, dressed as he was, could not be seen for 1,000 feet, and that the engineer could not have distinguished that he was attempting to stop the train for more than "200 or 300 feet" (Hughes); "300 or 400 feet" (Palmer); "200 feet" (Hale); "350 or 400 feet" (Elwin). The plaintiff testified that he was about 1,000 feet from the train when his signals were answered by the engineer. L. K. Adams, a witness for the plaintiff, testified that he had stopped this same train at Barrett's during April and May, by merely waving his hand, when the train was 1,050 feet away, and that his sig-
[5] nal had been seen and answered. The preponderance of the evidence does not depend alone upon the number of witnesses who testify to a fact. The court very properly told the jury that, in determining upon which side was the preponderance of the evidence, they "should take into consideration the oppor-

tunities of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial."

In view of the many facts and circumstances appearing upon this record which the jury might have considered as supporting plaintiff's story, and which they doubtless did consider in weighing the evidence given by the witnesses for the defendants, we cannot say that a different result should have been reached.

We do not find any reversible error in the record. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

NORTHERN PACIFIC RY. CO., APPELLANT, *v.* HAUSWIRTH, RESPONDENT.

(No. 3,371.)

(Submitted March 24, 1914. Decided April 16, 1914.)

[140 Pac. 516.]

Appeal and Error—Equity Cases—Defective Record—Rules of Supreme Court—Exhibits—Maps and Charts—Quieting Title—Complaint—Insufficiency.

Appeal and Error—Equity Cases—Defective Record—Dismissal.

1. Appellant in an Equity Case who disregards the requirement of subdivision 3 of Rule VII of the supreme court, to the effect that, where questions of fact arising upon the evidence presented in the record are submitted for review, the testimony must appear by question and answer, instead of in narrative form, is not entitled to have the appeal determined on the merits.

Same—Record—Exhibits—Maps and Charts.

2. Where maps and charts were used in the trial of an action to quiet title to a portion of plaintiff railway company's right of way frequent reference to which was made by the witnesses in their testimony, the

finding of the trial court *held* conclusive in the absence of these exhibits from the record.

Quieting Title—Complaint—Insufficiency.

3. Complaint in an action by a railway company to quiet title to land claimed by it as part of its right of way, *held* insufficient to state a cause of action under section 6870, Revised Codes, for failure of an allegation that defendant asserted a claim to any portion of the right of way, adverse to plaintiff.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by the Northern Pacific Railway Company against A. Hauswirth. From a judgment for defendant, plaintiff appeals. Affirmed.

Messrs. Gunn, Rasch & Hall, for Appellant, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

Mr. Elmer E. Hershey, for Respondent, submitted a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff to recover of the defendant damages for unlawfully interfering with its agents and servants while engaged in construction work upon the portion of its right of way which lies within and across the west half of the northwest quarter of section 17, township 11 north, range 15, west of the Montana principal meridian, in Missoula county, and also to obtain relief by way of injunction to prevent like conduct by the defendant in the future, which, it is alleged, he threatens to continue.

On March 11, 1903, the plaintiff, being the owner of section 17 as successor of the Northern Pacific Railroad Company, by virtue of the grant to the latter by the federal government to aid in the construction of its road and telegraph line, and having elected to avail itself of the provisions of the Act of Congress (30 Stats. at Large, p. 597), relinquished it to the United States. The reason for this election was that, prior to the

official survey of the public lands in that locality, one Jacob S. Marsellis had made a homestead settlement which included the west half of the northwest quarter of the section, and desired to secure patent therefor. In its relinquishment the plaintiff expressly reserved a right of way 200 feet in width on either side of its main line, "as the same is now constructed and operated on, or over or across said described premises." On August 26, 1904, Marsellis secured patent, and on May 11, 1908, conveyed to Sylvia May Hauswirth, the wife of the defendant, the deed, expressly excepting the right of way of plaintiff. When this controversy arose, the plaintiff's engineers and employees were engaged in double-tracking that portion of the line extending from Garrison to Missoula, and otherwise improving the track conditions by straightening curves, reducing grades, *etc.* To accomplish this, it became necessary to shift the line in places from one portion of the right of way to another. The plaintiff's fence, extending along the north side of its track, had theretofore stood at a distance of fifty feet from it. On March 10, 1909, the plaintiff's employees, desiring to borrow material from the right of way on that side, and presuming that it extended to the full width of 200 feet from the center of the main track, were proceeding to move the fence 150 feet farther toward the north, when they were stopped by the defendant. Thereupon this action was brought.

After deraigning the plaintiff's title and stating the character of the work being done, the complaint alleges: "That on or about March 10, 1909, and when a portion of the men so employed by this plaintiff were about to enter upon a portion of the right of way of this plaintiff, situated in the west one-half of the northwest one-quarter of section seventeen (17) above referred to, the same being a portion of the right of way so reserved by this plaintiff across said premises as hereinabove described, for the purpose of carrying on said work of construction and line change, and in the preliminary stages thereof, the defendant, with force and arms, entered upon said lands, and prevented the said servants and employees of this plaintiff

from entering thereon and performing said contemplated work, and threatened to inflict bodily injury upon them if they attempted so to do and persisted therein, and now threatens to inflict such bodily injury if said servants and employees should at any subsequent time attempt to enter upon said lands and prosecute such work; and that by his said actions and conduct the said defendant has prevented this plaintiff from carrying on the said work above referred to, and will, unless enjoined by this court, forever prevent this plaintiff from completing said work, and thereby cause great and irreparable damage to this plaintiff; and that, for the reasons aforesaid, the plaintiff has no plain, speedy, adequate, or complete remedy at law, and irreparable injury would result from the delay of giving notice of this application for restraining order. Plaintiff further alleges that, by and because of the interferences of defendant as aforesaid, it has been damaged in the sum of five hundred dollars."

Upon the filing of the complaint, supported by affidavits, the court granted a temporary injunction. The defendant answered, putting in issue the right of plaintiff to any portion of the land north of the fence. The parties waived a trial by jury. The court having heard the evidence, denied plaintiff's motion for findings and judgment in its favor, dismissed the action, and awarded defendant judgment for his costs. The plaintiff has appealed.

Counsel for plaintiff have submitted the case to this court upon the theory that it is an action, under section 6870 of the Revised Codes, to determine an adverse claim by the defendant. They contend that the evidence clearly and indisputably establishes the fact that it reserved its right of way to the full extent of 200 feet on either side of its main track, as it was located and operated at the time of the relinquishment, and thus put beyond controversy its title and right to the possession of it. Hence there is no justification in the evidence, they say, for a finding for the defendant. This would be a correct statement of the situation, did the evidence as presented

in the bill of exceptions disclose with any degree of certainty, the location of the reserved strip through the Hauswirth land. The reservation made at the time of the relinquishment was not of a right of way generally over any portion of section 17 in controversy, but by its terms it limited plaintiff's right to the use of a strip 200 feet in width on either side of its main line, as it was then constructed and operated. In order for the plaintiff to obtain any relief, the burden was upon it to show that it was being prevented by defendant from using some portion of the strip thus reserved. As a part of its case, it was incumbent upon it to locate definitely the position of the main line of its road at the date of the relinquishment. The condition of the evidence is such that it cannot be determined from it whether the defendant unlawfully and wantonly interfered with plaintiff's agents and their operations, or whether he was within his rights in preventing a trespass upon his wife's land. In the first place the body of the evidence is in narrative form. [1] This is particularly true of all that portion of it which was introduced for the purpose of locating the main line of track as constructed on March 11, 1903. Because of this omission to observe the rule applicable to such cases, the plaintiff is not entitled to have a determination of the appeal on the merits. (Rule VII, subd. 3, 44 Mont. xxx, 123 Pac. xi; *Gilmore* v. *Ostronich*, 48 Mont. 305, 137 Pac. 378.) Passing by the omission to observe the rule, it appears, in the second place [2] that, since the location of the main line of track as it was originally constructed, it has twice been shifted farther toward the north. In describing these changes, the witnesses referred to maps and charts, indicating the location of the line at different times by the use of the words "here," "there," *etc.* For illustration: The principal witness testified in this connection as follows: "There have been two changes made in that main line; that is all I know of. That is, this old line and the present new one, excepting here coming this way. There would be two changes—three lines. The first line would be the old grade. The second line was run in 1901–02, and the

third was run in 1908–09." The maps and charts do not accompany the record. Without the aid of them we cannot understand the purport of these and similar statements made by other witnesses. We therefore cannot undertake to say that the trial court did not assign to them their proper force and significance. (*Pope* v. *Alexander*, 36 Mont. 82, 92 Pac. 203, 565.) For this reason we must, of necessity, accept the finding of the trial court as conclusive, whether we adopt the theory of the case as we have stated it or the theory of counsel for the plaintiff. Again, if we accept the theory of counsel that the action [3] is one to quiet plaintiff's title under section 6870 of the Revised Codes, we reach the same result. The complaint does not allege that the defendant asserts a claim to any portion of the right of way adverse to the plaintiff. Hence it does not state a cause of action.

The judgment is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

CURTIS ET AL., RESPONDENTS, *v.* PARHAM, APPELLANT.

(No. 3,373.)

(Submitted March 25, 1914. Decided April 17, 1914.)

[140 Pac. 511.]

Sales—Livestock—Breach of Contract—Time of Essence—Evidence — Inadmissibility — Rescission — Duty of Buyer and Seller.

Sales—Breach of Contract—Time of Essence—Evidence—Inadmissibility.

1. Where a contract for the sale of sheep was silent as to time being of the essence of the contract, it was error, under section 5047, Revised Codes, which provides that time is never considered as of the essence of a contract, unless by its terms expressly so provided, to

permit oral evidence that such was nevertheless the intention of the parties.

Same—Rescission—Duty of Buyer and Seller.

2. Where time was not of the essence of a contract for the sale of sheep, the buyers could not, under Revised Codes, section 4936, claim violation of the contract or rescind for nondelivery on the day specified, without giving the seller an opportunity to tender performance, with compensation for delay; and the seller was obliged, within a reasonable time to tender performance, coupled with an offer to compensate for delay.

[As to when time is of essence of contracts, see notes in 50 Am. Dec. 597; 104 Am. St. Rep. 265.]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by Fred H. Curtis and Fred E. Freeman, copartners doing business under the name of Curtis & Freeman, against Owen B. Parham. From a judgment for plaintiffs and an order denying his motion for new trial, defendant appeals. Reversed and remanded.

Messrs. F. B. Reynolds and *W. M. Johnston,* for Appellant, submitted a brief; *Mr. Reynolds* argued the cause orally.

Under our statutory rule, if contracting parties desire to make time as of the essence of the contract, they must so expressly stipulate in the contract; otherwise time will not be so considered. There is nothing in the case at bar that shows that time was intended to be treated as of the essence of the contract, and there was no error in refusing the request of defendants for the instruction numbered 6. (*Snyder* v. *Stribling,* 18 Okl. 205, 89 Pac. 222; *Standard Lumber Co.* v. *Miller etc. Lumber Co.,* 21 Okl. 624, 96 Pac. 761; *Snyder* v. *Rosenbaum,* 215 U. S. 261, 54 L. Ed. 186, 30 Sup. Ct. Rep. 73.) Time is never considered as of the essence of a contract unless by its terms expressly so provided. (*Fratt* v. *Daniels-Jones Co.,* 47 Mont. 487, 133 Pac. 700.)

Messrs. Miller & O'Connor, for Respondents, submitted a brief; *Mr. J. F. O'Connor* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On June 20, 1910, at Jonesville, Michigan, the plaintiffs and the defendant entered into the following contract:

"Owen B. Parham,

"Sheep Dealer, Billings, Montana.

"This is to certify that Owen B. Parham, of Billings, Mont., has this 20th day of June, 1910, bargained and sold to Curtis & Freeman of Jonesville, Mich., the following described live stock, and do hereby guarantee the title thereto, *viz.*:

"No. head, 6,000; description, mixed lambs; brands, ——; price per cwt., $5.50; time and place of delivery, Sept. 25, 1910, Livingston, Mont., f. o. b. cars. To be no extremely coarse shaggy wooled lambs. Curtis & Freeman agree to use two days in receiving lambs. Stock guaranteed to be in merchantable condition at time of delivery. All sheep bought subject to federal inspection. Received in part payment for above-mentioned stock, $2,000.

"[Signed] OWEN B. PARHAM.
"F. H. CURTIS & FREEMAN."

The complaint, declaring upon the above contract, alleges that time of delivery was of the essence thereof, that no lambs were delivered or tendered on September 25, 1910, or for several days thereafter, that the lambs which defendant held for delivery were not of the requisite kind or quality, and prays for the return of the moneys paid down by the plaintiffs, with other damages. The answer denies that time of delivery was of the essence of the contract, denies that the lambs held by him for delivery were deficient in quality, and pleads excusable delay in such delivery. By way of counterclaim, it is alleged that plaintiffs agreed to receive delivery on October 4, 1910, at Clyde Park and Big Timber; that they refused to accept such delivery; and that damages accrued to defendant in consequence thereof. The affirmative allegations of the answer and counterclaim were put in issue by reply.

Verdict and judgment were for the plaintiffs. The defendant appeals from the judgment, and from an order denying his motion for new trial.

The undisputed facts are: At the time the contract was made, the plaintiffs were informed that the lambs referred to were the Wirak lambs. The plaintiffs appeared at Livingston on September 24 for the purpose of taking delivery, but, though they remained at Livingston until October 2, no lambs were delivered or tendered. The reason for this was that part of them had become involved in a "mix-up," and had to be taken to Clyde Park for separation, and the other part had met with storms and bad weather, and could not be brought in as soon as intended. By message from defendant on September 27, plaintiffs were informed that Wirak could not deliver until about October 1; whereupon they wired to defendant: "Contract violated; on ground to make other arrangements; advise immediately." To this defendant rejoined: "Contract not violated; will be able to make delivery soon; will be up to-night." On September 28 the parties conferred at Billings, and, upon the return of plaintiffs to Livingston, they saw Mr. Wirak, and learned from him that part of the lambs were at Clyde Park. On September 30 the plaintiffs proceeded to Clyde Park, looked over the lambs which were there, decided they were not up to the requirements of the contract, and came back to Livingston. On October 2, after making demand on defendant for the moneys paid down on the contract, which was refused, they returned to Michigan.

The other issues of fact were the subject of conflicting evidence, but it is quite doubtful whether, upon the whole case, plaintiffs were warranted in concluding that the defendant could not deliver out of the Wirak bands enough lambs of the quality required to meet the contract. Be that as it may, the plaintiff Freeman specifically testified: "If the lambs had been according to the contract, we would not have received them on the original contract, because it was after the time we were to receive them."

Ten alleged errors are assigned, presenting certain matters of practice, and one really vital question, *viz.*: Was time of delivery of the essence of the contract? Much testimony touch-
[1] ing the intent of the parties was received as illuminative of this, but we do not reproduce it, because we deem it wholly irrelevant. Section 5047, Revised Codes, provides: "Time is never considered as of the essence of a contract, unless by its terms expressly so provided." Language so plain ought to leave no doubt of its meaning or application, and comment could serve only to obscure it. Under this section, but one subject is open to discussion, and that is not what the parties may have intended to say, but what they did say in their contract. It is true, of course, that no set form or arrangement of words is necessary, but the contract must, upon its face, convey the meaning that time shall be of the essence. Our statute will not permit an oral extrinsic showing that such was the intention of the parties to a written contract, the terms of which are expressed in clear and explicit language. (*Strunk* v. *Smith*, 8 S. D. 407, 66 N. W. 926; *Standard Lumber Co.* v. *Miller etc. Lumber Co.*, 21 Okl. 624, 96 Pac. 761; *Snyder* v. *Stribling*, 18 Okl. 205, 89 Pac. 222, 233, affirmed, *Snyder* v. *Rosenbaum*, 215 U. S. 261, 54 L. Ed. 186, 30 Sup. Ct. Rep. 73.)

There is nothing in the contract before us to indicate that time of delivery should be deemed as of its essence; but the respondent urges that the subject-matter was of such character as to bring it within the decision of this court in *Snider* v. *Yarborough*, 43 Mont. 203, 207, 115 Pac. 411. That case arose, not upon a contract of sale, but upon an option which is a mere unilateral undertaking, and the subject matter of it was a mining claim, a species of property subject to sudden, frequent and great fluctuations in value. To make such property the subject of an option is to express that time shall be of the essence. (*Waterman* v. *Banks*, 144 U. S. 394, 36 L. Ed. 479, 12 Sup. Ct. Rep. 646.) Neither the transaction at bar nor the property involved were of a character to come within the decision referred to.

The evidence *aliunde* the contract touching the intent of the parties as to time being of the essence was inadmissible, and had no probative value. The court should have held, as a matter of law, that time was not of the essence, and categorically instructed the jury accordingly. For substantial error in this regard, the cause must be retried; and, since this is so, attention is called to the fact that the effect of section 4936, Revised [2] Codes, appears to have been ignored by everyone. The plaintiffs could not rescind or claim a violation of the contract on account of time, as they seem to have done on September 27, 1910, without giving the defendant an opportunity to make tender of performance, with compensation for delay; on the other hand, the duty was imposed upon the defendant to make, within a reasonable time after September 25, 1910, a tender of performance, coupled with an offer to compensate for the delay, unless excused therefrom by the attitude of plaintiffs. What, under the circumstances, was a reasonable time was for the jury upon the evidence.

We see no reversible error in any other respect. The refusal of defendant's offered instrument No. 5 was wrong, but relatively unimportant. The questions asked touching the value of the lambs at Big Timber and Clyde Park on October 4 were improper, and the court correctly refused to permit them to be answered. The contract was in writing. Any modification of it was required to be in writing, unless executed. The counterclaim, to support which these questions were asked, is based upon an alleged oral, unexecuted modification. Independently of that, the questions had no relevancy to any matter in issue.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. COTTER, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,452.)

(Submitted March 26, 1914. Decided April 22, 1914.)

[140 Pac. 732.]

Husband and Wife—Letters of Administration—Special Administrators—Selection—Revision of Statutes—Title—Constitution—Divorce—Remarriage.

Husband and Wife—Letters of Administration—Who Entitled Thereto.

1. The surviving husband or wife is, under section 7432, Revised Codes, entitled to letters of administration to the exclusion of any other person unless one of the grounds of incompetency enumerated in section 7436 is shown to exist.

Same—Special Administrators—Preference to Appointment.

2. In the absence of a showing of incompetency, the person who is entitled to letters testamentary or of administration must be given the preference in the selection of a special administrator.

Statutes—Revision of—Title.

3. A bill the purpose of which is to revise by amendment the law on a particular subject, *held* to fall within the exception of section 23, Article V, of the state Constitution that no bill "except bills for the * * * general revision of the laws" shall be passed containing more than one subject, which shall be clearly expressed in its title.

[As to sufficiency of title to amendatory or revisory Acts, see notes in 79 Am. St. Rep. 456; 86 Am. St. Rep. 267.]

Same—Divorce—Remarriage—Statutes.

4. Under the above rule, section 3657, Revised Codes (section 91, Civil Code of 1895, as reported by the Code Commissioner), regulating remarriage of divorced persons, *held* to have been repealed by House Bill 142, approved March 6, 1895, an Act to amend certain sections of the Civil Code dealing with the subject of divorce, though the title of the repealing Act did not contain any reference to section 91.

Same—Constitutionality—Construction—Considerations Entering Into.

5. Where attorneys general for nineteen years had advised county officers that section 3657, Revised Codes, prohibiting the remarriage of divorced persons for a certain number of years, had been repealed, the supreme court would, in case of doubt on the question whether the repealing Act had been constitutionally enacted, be inclined to uphold it in view of the disastrous consequences which would follow a contrary holding.

Original application by the state, on the relation of Harry C. Cotter, against the district court of Lewis and Clark county and one of the judges thereof, for a supervisory order annulling an order made in a probate proceeding. Order annulled.

Mr. W. D. Rankin and *Mr. H. A. Frank* submitted a brief in behalf of Relator; *Mr. Frank* argued the cause orally.

Mr. C. B. Nolan, for Respondents, submitted a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On December 22, 1913, Mary Margaret Cotter died in Lewis and Clark county, leaving a will in which Thomas Cruse, her father, is named as her sole legatee. The will does not designate an executor. On December 29 Thomas Cruse filed in the district court a petition asking that the will be admitted to probate and that he be appointed administrator with the will annexed of the estate of the deceased. On January 9, 1914, the relator herein, as surviving husband of the deceased, appeared to contest the will by filing written grounds in opposition to the probate of it. At the same time he presented to the court a petition asking that he be appointed special administrator pending a determination of the contest. On January 16 Thomas Cruse filed his petition asking that he be appointed, presenting therewith, in writing, objections to the appointment of the relator on the grounds, among others, that he is not the surviving husband of the deceased, and that he is incompetent to act as administrator by reason of his improvidence. The petitions and objections were heard together, with the result that on January 27 the court made and caused to be entered an order denying the petition of the relator, and appointing Thomas Cruse. Thereupon, there being no appeal, the relator applied to this court for a supervisory order annulling the order of the district court and directing the appointment of himself. Two questions are submitted for decision, *viz.:* Whether, upon the facts disclosed, the relator is the surviving husband of the deceased; and whether he is incompetent by reason of his improvidence.

Upon the assumption that he is the surviving husband of the deceased, and legal cause was shown for the appointment of a special administrator (that such cause was shown is not now controverted), the relator was *prima facie* entitled to the appointment. The surviving husband or wife is entitled to **[1, 2]** general letters of administration, to the exclusion of any other person (Rev. Codes, sec. 7432), unless at least one of the grounds of incompetency enumerated in section 7436 is shown. In selecting a person to act as special administrator, the court or judge is expressly required to give preference to the person who is entitled to letters testamentary or of administration. (Section 7472.) A refusal to accord the preference thus given, in the absence of a showing of incompetency, is a direct violation of this provision. (*State ex rel. Eakins* v. *District Court*, 34 Mont. 226, 85 Pac. 1022.)

It appears that the deceased obtained a divorce from her first husband by a decree of the district court of Lewis and Clark county, on May 19, 1911, and that she and the relator were married at Boulder, in Jefferson county, on October 26, 1911. It was insisted by counsel for Thomas Cruse in the district court, and the same argument was made at the hearing **[3, 4]** in this court, that the second marriage, being within the prohibition of section 3657 of the Revised Codes, was void, and hence that the relator, not having thereby become the lawful husband of the deceased, occupies the position of a stranger to the estate, and is not entitled to administer it, without regard to the question whether he is otherwise competent. Counsel for the relator have proceeded upon the assumption that section 3657 *supra*, was repealed by an Act of the legislative assembly approved March 6, 1895, and hence could not affect the validity of the marriage. This assumption, it is said by counsel for Thomas Cruse, is unwarranted because the invalidity of the repealing Act is apparent on its face, in that the title of it, as enacted and approved by the governor, contained no reference to section 3657, and was therefore obnoxious to the provisions of section 23, Article V, of the Constitution, which declares: "No

bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject which shall be clearly expressed in its title; but if any subject shall be embraced in any Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed." Section 3657 reads as follows: "When a divorce is granted for any of the causes mentioned in section 3643, the innocent party cannot marry until after the expiration of two years, and the guilty party cannot marry until after the expiration of three years from the entry of the judgment of divorce; but this section shall not prevent the parties to the action for a divorce from remarrying each other at any time."

To a proper understanding and decision of the question presented, a brief statement of the history of the legislation is necessary. The Code Commission created by the Act of the territorial legislature approved March 14, 1889 (Laws 16th Sess. p. 116), filed with the secretary of state on February 4, 1892, the result of its labors in the form of four Codes, which, with amendments thereto, were adopted by the fourth legislative assembly, as the Civil Code, Code of Civil Procedure, Penal Code and Political Code, and were published as the Codes of 1895. When the assembly convened in January, 1895, it at once became a question what course should be pursued by it in adopting these Codes. The plan recommended by the Code Committee was to enact each Code as a whole by a separate bill with certain excepted provisions, and thereafter to enact such amendments by separate bills as might be deemed necessary (House Journal, p. 115); and this plan was adopted and pursued. House Bill 36, to establish a Civil Code, was introduced on January 17 (House Journal, p. 86). It was finally adopted on February 19 (House Journal, p. 280), and approved by the governor on the same day. The Parts, Divisions, Titles, Chapters, Articles, and section numbers, except certain sections which had been stricken out, remained as they were when the Code was reported by the Commission. By its own terms, the

Code was to become effective on July 1, 1895. On February 1, House Bill 142 was introduced, entitled: "An Act to amend sections 90, 95, 110 and 112 of the Civil Code of the state of Montana." This was approved and became a law on March 6. It consisted of two sections. The first re-enacted sections 90, 95, and 112, as amended; the second provided: "Sec. 2. That section 91 of the Civil Code of the state of Montana is hereby repealed." Section 91, it will be observed, is not mentioned in the title. Section 110 is not anywhere mentioned in the body of the bill. Amended sections 90, 95, and 112 found their way into the Code as finally published, under the section numbers 145, 160, and 177, and appear in the Revised Codes as sections 3656, 3658, and 3675. Section 110 appeared in the Code of 1895 as section 175, and is section 3673 of the Revised Codes. All of these sections relate to the subject of divorce. The commissioner provided for by the same legislative assembly to compile and codify the general laws enacted by the third and fourth legislative assemblies, to arrange the same in proper form and to insert their various provisions in the several Codes in their appropriate places, being of the opinion that section 91, *supra,* had not been repealed, because not mentioned in the title of the bill, brought it forward into the Codes as section 146, and it appears in the Revised Codes as section 3657.

It was said by this court, in considering the validity of another statute enacted at the same session of the legislature, the title of which was similarly defective: "The task of the fourth legislative assembly was a most arduous one. It was essentially a session of codification and general revision of all the laws of the state, both those which had been carried forward from the session Acts of the territory, and those which had been enacted at the third session of 1893." (*In re Ryan,* 20 Mont. 64, 50 Pac. 129.) This statement is amply justified by the brief history of the course of legislation during the sitting of that assembly, and the plan adopted to accomplish the task before it. Recognizing the impossibility of considering section by section the four Codes, consisting of some 10,000 sections, within the sixty

days allotted to it under the Constitution in which to complete its work, it was compelled to adopt some more practicable and expeditious plan to secure their adoption. The plan adopted, though anomalous, is not obnoxious to any express or implied provision of the Constitution so far as we are advised. It cannot be doubted that a single bill having for its purpose a revision by amendment of all the Codes, simply mentioning in its title the sections intended to be revised by amendment, would have been a general revision measure. By the very terms of the section of the Constitution, *supra*, it would not have been objectionable, because that character of bill falls clearly within its exception. But for the provision, a bill of any description enacted without any title is valid. (*Lane* v. *Commissioners of Missoula County*, 6 Mont. 473, 13 Pac. 136; Cooley on Constitutional Limitations, 202.) The prohibition is aimed at ordinary legislation with the subject of which the members of the legislative body and the public are not supposed to be familiar. Its purpose is: "First, to prevent hodge-podge or 'log-rolling' legislation; second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." (Cooley on Constitutional Limitations, 205.)

The obvious reason for the exception of appropriation bills and bills for the codification and general revision of the laws is that the first are necessary for the maintenance of the government, and hence their validity ought not to be open to question for informality; and the latter are so extraordinary in their character that both the members of the legislative body and the public are presumed to know what is being done. Furthermore, it would be impracticable to formulate a title which would

cover every subject embraced in such a bill. In any event, a bill of either class does not fall within the prohibition. Can it be maintained that an *omnibus* revision bill covering all the Codes, or a similar bill covering any one of them, would have been within the exception, while a bill the plain purpose of which was to revise the laws upon a particular subject found in any of them, is not? We think not. In view of the plan of procedure adopted at the outset and consistently pursued throughout the session to accomplish a definite result, *viz.*, the adoption of the Codes, with such amendments as were deemed necessary and advisable to render them harmonious and consistent with each other, and to eliminate conflicts which existed between many of their provisions and other Acts of the legislature which it was designed to preserve and keep in force, we think that the separate bills, the obvious purpose of which was to revise and harmonize or amend the laws on particular subjects, should be regarded as revisionary in character and be held to fall within the exception also. Of such a character was House Bill 291, enacted at the same session of the legislature, the validity of which was drawn in question in *In re Ryan, supra.* Its title indicated that the purpose of it was to revise, by way of amendment, numerous sections of the Political Code then in the course of enactment by the legislature, and other laws theretofore enacted relating to municipal corporations. In the body of it was a provision amending section 3466 of that Code, but there was no mention of this section in the title. The validity of it was upheld on the ground that, since its title sufficiently disclosed its purpose to be a revision of the laws relating to municipal corporations, the omission to mention in the title the amended section might be treated as a clerical oversight. While the decision is put upon the ground that the title sufficiently indicated the purpose of the bill, the fact that its purpose was a general revision of the laws on the particular subject evidently had great weight in inducing the court to the conclusion it reached.

It must be borne in mind that the Act in question was introduced and was on its passage at the same time the Code itself was under consideration. The title so far as it expressed the subject was not misleading. Indeed, it was in a sense legislation being considered concurrently with that embodied in the Code, intended to become a substantial part of it and to become operative at the same time the Code itself went into effect, *viz.*, on July 1, 1895. It would never have become operative unless the Code itself had been adopted. For the reason that the bill was introduced as a part of the general plan of codification and revision in hand, we think it should be classed under the head of revisionary legislation on the subject of divorce, and to fall within the exception of the Constitution applicable to such legislation, and as not rendered invalid by the apparent defect in its title.

If we entertained any doubt upon the subject, we would [5] incline to uphold the legislation for this reason: Soon after the Code went into effect, the question arose as to whether section 3657, *supra,* was operative. The attorney general of the state was of the opinion that it had been effectively repealed by the Act in question, and so instructed the county attorneys throughout the state. His successors in office have been of the same opinion, all having given written opinions to that effect. For this reason the county attorneys have refrained from instituting prosecutions for violations of section 495 of the Penal Code of 1895 (Rev. Codes, sec. 8358), and have advised the clerks in their respective counties that the prohibition found in section 3621 of the Revised Codes, is inoperative. The result is that many marriages have been contracted during the nineteen years intervening since the adoption of the Codes of 1895, the validity of all of which, if we should reach a contrary view of the law, would be brought in question. The legitimacy of a multitude of children born of such marriages during these years would be rendered doubtful, and the titles vested in them under the laws of succession would at once become the subject of controversy. While such

considerations as these should not deter a court from declaring the law as it finds it, nevertheless in a doubtful case it would hesitate to announce a conclusion that would entail such consequences.

Counsel for respondents cite the case of *State* v. *Mitchell,* 17 Mont. 67, 42 Pac. 100, as directly in point in support of their contention. The title of the Act there in question was unintelligible and misleading because its purpose as expressed in the title was to amend a Chapter of the Penal Code relating to gaming which had been stricken from the bill to establish that Code, and was not a part of it when it was finally adopted and approved by the governor. There was not, therefore, before the legislature at that time anything which could be the subject of amendment. This, it seems, was a sufficient reason to invalidate the Act. Be that as it may, under the circumstances the Act could not have been sustained upon any other theory than that it was a piece of independent legislation dealing with the subject of gaming, and hence did not fall within the exception in favor of revisionary legislation. For these reasons we do not think the case in point.

In the foregoing discussion we have assumed that if section 3657, *supra,* were operative, it would render void any marriage falling within its prohibition. Since we have reached the conclusion that it was repealed by House Bill 142, *supra,* it is not necessary to determine whether it would have had this effect or would have rendered such marriage voidable only.

From the foregoing the conclusion follows that the marriage between the relator and deceased was valid, and that as the surviving husband he is *prima facie* entitled to be considered first by the court in the selection of a competent person to act as special administrator. There is scarcely any evidence in the record of a substantial character tending to show that he is incompetent by reason of his improvident habits. It is apparent, however, that the district judge denied his application and made the order of appointment as it did, upon the theory that the marriage was void, and that relator is not eligible for this

reason. The question whether he is not eligible because of improvidence was thus not considered nor determined. We shall not undertake to make a finding in this behalf, and decide finally that he is entitled to the appointment, but leave this question for decision by the district court.

The order is therefore annulled, with direction to the district court to grant the petition of relator, unless, from the evidence taken or which may be taken at a further hearing, it is found that he is incompetent because of improvidence. In this event the court will appoint some suitable and competent person selected by the relator, or in default of such selection, the petitioner Thomas Cruse.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

STATE EX REL. FOSTER, RELATOR, v. RITCH ET AL., RESPONDENTS.

(No. 3,471.)

(Submitted April 11, 1914. Decided April 22, 1914.)

[140 Pac. 731.]

Mandamus—New Counties—Adjustment of Property Rights—Bridges—Not County Property.

1. *Held*, on *mandamus*, that, generally speaking, bridges—which are but portions of the public highway—are not county property, within the meaning of that term as employed in section 7, Chapter 112, Laws of 1911, the value of which shall be ascertained and considered in the adjustment of the property rights and liabilities of counties out of which a new one has been created.

[As to the relation of new counties to the old from which they have been formed, see note in 20 Am. St. Rep. 676.]

Original application for writ of mandate by the state of Montana, on the relation of C. A. Foster, against John B. Ritch and others as the Board of Commissioners appointed to adjust the indebtedness and property rights of Valley and Sheridan counties, upon the creation of the latter. Dismissed.

Messrs. Galen & Mettler, for Relator, submitted a brief; *Mr. Albert J. Galen* argued the cause orally.

Mr. D. M. Kelly, Attorney General, and *Messrs. J. H. Alvord* and *C. S. Wagner,* Assistant Attorneys General, for Respondents, submitted a brief; *Mr. Alvord* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Upon the creation of Sheridan county from a portion of Valley county, the commission appointed by the governor to adjust the property rights and indebtedness reported that the new county owed the old one $108,436.98. This proceeding was instituted by a resident taxpayer of Sheridan county to compel the commission to reassemble and to reapportion the indebtedness. The ground of complaint is that, notwithstanding there were "in Valley county, Montana, divers and sundry expensive steel bridges, aggregating in value at that time more than $162,000, and there were then located in Sheridan county bridges aggregating in value not to exceed the sum of $54,000," the commission declined to consider the value of these bridges in determining the net indebtedness of Valley county and the proportion thereof properly chargeable to Sheridan county.

The only question for determination upon this application is [1] whether "bridges" are to be deemed county property, within the meaning of that term as used in section 7, Chapter 112, Laws of 1911, and their value to be ascertained and employed in the final adjustment of the property rights and liabilities of the old county and the new one. We are not furnished any information by this application as to the character of the bridges referred to, or the source from which the funds employed in their construction were obtained. The description is in the most general terms, and, in the same way we say that bridges, generally speaking, are not such county property as that their value shall enter into consideration in the adjustment of the indebtedness of the old county with the new one. A bridge is

to be treated as but a portion of a public highway. (*Reid* v. *Lincoln County*, 46 Mont. 31, 125 Pac. 429; *State ex rel. Horsley* v. *Carbon County*, 38 Utah, 563, 114 Pac. 522; *Independent Highway Dist.* v. *Ada County*, 24 Idaho, 416, 134 Pac. 542.) Indeed, that question is settled by our own Code. Section 1337, Revised Codes, as amended by section 3, Chapter 72, Laws of 1913, provides: "All highways, roads, lanes, streets, alleys, courts, places and bridges laid out or erected by the public or now traveled or used by the public, or if laid out or erected by others dedicated or abandoned to the public, or made such by the partition of real property are public highways." It was clearly not the intention of our legislature that all public highways, including the roads, streets, alleys, courts, culverts, and bridges composing the same, should be appraised as county property, and the value, thus set upon them, considered in adjusting the county indebtedness. It may be that a bridge upon a road which has been abandoned has a distinct, independent value, and bridges constructed from special funds created by the sale of bonds, or otherwise, may possess the character of "county property," in the sense in which that term is used in the Act now under consideration; but those questions are not before us now, and cannot be considered in this proceeding.

Upon the record as presented, the relator is not entitled to any relief, and the application is therefore dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. LITTLE, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,462.)

STATE EX REL. McCONNELL, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,467.)

(Submitted March 26, 1914. Decided April 22, 1914.)

[141 Pac. 151.]

Supervisory Control—District Courts—Departments—Division of Business — Rules — Jurisdiction — Wrongful Interference.

District Courts—Departments—Power of Judges.

1. Where a district court is divided into two or more departments, they constitute but one court, each of the presiding judges over which has all the power conferred upon any district judge in the state to hear and determine a cause arising in said court.

Same—Trial by Particular Judge—Rights of Parties.

2. No party litigant has any vested right to have his cause heard before a particular judge.

Same—Departments—Rules—Right to Make.

3. *Obiter:* Each judge of a district which has more than one judge has authority to make rules of court for the control of the business before the department over which he presides, provided they are confined to legitimate subjects for government by court rules.

Same—Rules—Upon Whom Binding.

4. The distribution of the business of a judicial district having more than one judge, "as equally as may be" between the judges presiding over the different departments thereof, made obligatory upon such judges by section 6278, Revised Codes, *held* to be personal to, and binding upon, those judges only who make the apportionment, rendering a redistribution necessary upon a change in their personnel, if so desired.

Same—Departments—Jurisdiction—Wrongful Interference—Effect.

5. *Held*, under the rule declared in paragraph 4 above, that where the term of one of two judges of a district who had agreed to a rule, whereby all matters of a criminal nature were automatically assigned to one department thereof, had expired and a redistribution of the business was not made between his successor and the judge who continued in office, the former had full power to hear and determine a criminal cause based upon an indictment returned by a grand jury impaneled by him, and the latter exceeded his authority by assuming jurisdiction and quashing the indictment.

MR. CHIEF JUSTICE BRANTLY concurring specially.

PETITION by the state, on the relation of Howard Little, for a writ of prohibition against the district court of the first

judicial district of the state, in and for the county of Lewis and Clark, and J. Miller Smith, a judge thereof, consolidated with a petition by the state, on the relation of A. H. McConnell, county attorney, for a writ of *certiorari* to the same court, and J. M. Clements, the other judge thereof. Prohibition denied, and proceedings attacked by *certiorari* held void.

Mr. O. W. McConnell and *Mr. E. A. Carleton,* for Relator Little, in Cause No. 3,462, submitted a brief and argued the cause orally.

Mr. A. H. McConnell, for Respondents, submitted a brief and argued the cause orally.

In cause No. 3,467, *Mr. A. H. McConnell,* appearing *pro se* as Relator, submitted a brief.

Messrs. O. W. McConnell and *E. A. Carleton,* for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 10, 1905, the district court of the first judicial district of Montana, Judges Henry C. Smith and J. M. Clements presiding, made and promulgated a code of rules for the government of the practice in that court, and which further assumed to apportion the business of the court between the judges. Rule 1 divided the court into two departments, designated, respectively, department 1 and department 2. Rule 2 provided: "All criminal causes and matters of a criminal nature are hereby assigned to department 1."

On February 7, 1914, Hon. J. Miller Smith, the presiding judge in department No. 2, ordered a grand jury, which was duly impaneled and charged, and which thereafter, on March 5, returned into court, and into department No. 2, certain indictments, by one of which Howard Little was accused of violating the anti-gambling law of this state. Upon being arrested

and brought into court, and into department No. 2, for arraignment before Judge Smith, Little interposed the objection that under Rule 2 of the Rules of the court, Judge Smith had no authority to proceed in the case, and asked that it be transferred to department No. 1. The objection was overruled, the motion denied, and, upon the refusal of Little to plead, a plea of not guilty was entered for him, and the cause set for trial in department No. 2 for March 13. Immediately thereafter Little appeared before Judge Clements in department No. 1 and was again arraigned. A motion to quash the indictment was interposed, and thereafter this motion was sustained by the court in department No. 1, Judge Clements presiding, and an order was entered discharging the defendant and exonerating his bail. Anticipating that the court in department No. 2 would insist upon trying him on March 13, the defendant Little applied to this court for relief. Before his application could be heard or determined, Andrew H. McConnell, the county attorney of Lewis and Clark county, applied for a writ of *certiorari* to bring before the court all of the record of the proceedings had in department No. 1 in the case of the *State* v. *Little*. The writ was issued, the return made, and the two causes heard together.

Strictly speaking, neither proceeding alone entitles the relator therein to the relief demanded; but the two together present all the records, facts and circumstances involved, and since the matter which it is sought to have determined is of public interest and concern, technical questions of practice will be disregarded, and the two proceedings will be deemed to be consolidated and treated as an application for a writ of supervisory control for all the relief demanded in both applications.

1. Upon the presentation of the indictment there was pending in the district court of the first judicial district of Montana, in and for Lewis and Clark county, a cause entitled "*The State of Montana* v. *Howard Little.*" There is but one such court, [1] and that it had jurisdiction to hear and determine all questions arising in the *Little Case* cannot be gainsaid. (Article

VIII, sec. 11, Constitution of Montana; sec. 8416, Rev. Codes.) Likewise, that Judge Smith was authorized to call a grand jury is beyond dispute. Section 6367, Revised Codes, provides: "In districts where there are two or more judges each judge may order a grand jury to be drawn and summoned to attend the session or term over which he presides, as provided in this article, but no more than one grand jury must ever be in attendance upon any district court at the same time."

Primarily, each of the two judges of the district court of the first district has all the power and authority conferred upon any district judge in this state, and, nothing further appearing, the court, presided over by either Judge Clements or Judge Smith, had complete jurisdiction to hear and try the cause of *State* v. *Little*, and the defendant could not complain that either one or the other of the judges presided, for no litigant or party [2] to an action or proceeding has any vested right to have his cause heard before a particular judge.

2. "Every court of record may make rules not inconsistent with the laws of this state, for its own government." (Rev. Codes, sec. 6293.) Such rules, when duly promulgated, have the force and effect of statutes within the territorial limits of the district (*Montana Ore Pur. Co.* v. *Boston & Mont. etc. Co.*, 27 Mont. 288, 70 Pac. 1114; *State ex rel. Nissler* v. *Donlan*, 32 Mont. 256, 80 Pac. 244), and are binding upon the judges of the court, as well as upon all other persons.

But it is insisted by counsel for relator Little that Rule 2 above, promulgated in 1905, not having been modified, repealed or superseded, was binding upon Judge Smith, and by virtue of that rule the case of *State* v. *Little* was automatically assigned to department No. 1, and, since Judge Smith was not invited by Judge Clements to try this cause, and the cause was not transferred from department No. 1 to department No. 2, Judge Smith had no authority to arraign the defendant, or to preside at the trial of the case against him. Assuming the premise to be correct, the conclusion would follow as of course; but the premise is fundamentally erroneous, and the conclusion not

less so. To distinguish between a court and a judge of the court would be idle pastime at this late day. The distinction is recognized by laymen, as well as by members of the legal profession. It is emphasized by the legislature in many statutes, [3] and in different sections of the Codes. It is unnecessary to the determination of the matter before us to decide whether each judge of a district which has more than one judge has authority to make rules of court for the control of the business before the department over which he presides. No valid objection to his doing so can be suggested, so long as the rules are confined to legitimate subjects for government by court rules. But assuming, for the purposes of these proceedings, that the rules of court adopted in 1905 are now binding upon both judges of the district court of the first judicial district, so far as they deal with proper subjects for regulation by court rules, the question of the effect of Rule 2 of those rules, which assumes to distribute the business between the judges, is before us for decision, and with it the question of the right of Judge Smith to preside at the trial of the case of *State* v. *Little,* in the absence of any agreement by him and Judge Clements upon a distribution of the business of the court between them.

3. The question has been removed from the realm of doubt or uncertainty by positive statutory enactment. The members of the legislature must have appreciated fully that the matter of distributing the business of a court between the judges presiding therein is one of convenience; that, so long as the business is efficiently and expeditiously transacted, no one is concerned as to the particular judge who sits in the trial of a given case; that, if a division of the business is actually made, and in point of volume of business the division is an equitable one, the purpose of the law is conserved, and the interest of the public fully satisfied.

With these elementary principles in view, section 6278, Revised [4] Codes, was enacted, and by its provisions the judges of a district having more than one judge are required to "appor-

tion the business among themselves as equally as may be." To make this distribution is a duty which was very sensibly enjoined upon the judges, and not upon the court. The propriety of any particular division of court business depends upon the temperaments of the individual judges, their choice of work, and their adaptability to it. Whether criminal cases shall be tried in one department or the other is a matter which cannot possibly interest anyone but the judges themselves. Even under the arrangement provided in the rules of 1905, the case of the *State* v. *Little* might have been transferred to department No. 2, or Judge Smith might have been called into department No. 1 to try it by agreement of the judges, even over the most pronounced opposition of the defendant. The statute above makes the apportionment of the business a matter entirely personal to the individuals who happen to be the judges, and as a consequence the division made by the judges at any given time cannot from the very nature of the case be binding upon their successors. The law clearly implies that upon a change in the personnel of the judges there shall be a redistribution of the business, if that be necessary to meet the convenience and choice of the judges. The section of the Code above treats of the division of court business and the enactment of court rules as entirely independent matters. It provides that the judges *may* divide the court into departments; but it is left altogether optional whether they do so or not. They *may* prescribe the order of business; but they are not required to do so. They *may* make rules for the government of the court; but there is no obligation to that end imposed. But when the legislature came to consider the distribution of the business of the court, it spoke in no uncertain terms. The judges *must* apportion it between themselves as equally as may be. The obligation is an absolute one. The duty imposed is a legal duty from the discharge of which there is no escape, save by resignation from office. Because the distribution of business is personal to the judges, it is not a subject within the purview of court rules; and rule No. 2, adopted in 1905, while effective as the expres-

sion of the will of the judges in office at that time, is not binding upon the present judges.

Our attention is directed to certain expressions to be found in *State ex rel. Nissler* v. *Donlan,* above, in apparent conflict with the views just expressed; but in that case the question: Where rests the authority to distribute the business of the court among the judges? was not raised or considered, and the observations upon rules of court are declared in the opinion to be "somewhat of a digression."

It is beside the question to consider what might have been done by mutual arrangement of the judges or consent of the litigants, and authorities treating cases arising under such conditions are of no assistance in this instance. We are compelled to treat all the parties interested in these proceedings, and their acts herein referred to, as hostile. It was not to aid Judge Smith in the disposition of the *Little Case* that Judge Clements acted, but to displace him altogether, and that, too, against his will.

4. In the absence of any agreement between these two judges [5] upon an apportionment of the business of the court between them, or, what is the same thing, between their departments, either one, when in open court, possessed all the power and authority of the district court to hear and determine the case of the *State* v. *Little,* and, cognizance of that cause having first been taken in department No. 2, it was beyond the power of any other court of concurrent jurisdiction, or any other department of the same court, to interfere. These rules are elementary, and their observance necessary to the orderly dispatch of business and the protection of the rights of litigants.

All of the proceedings had in department No. 1 in the case of *State* v. *Howard Little* are void, and are set aside and held for naught. The relator Little is not entitled to the relief demanded.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY:

I concur in the result reached by MR. JUSTICE HOLLOWAY in this case; but I desire to say that, in my opinion, while section 6278 is in terms addressed to the judges, it makes it obligatory upon them in the aggregate, and hence upon the court, to apportion the business of the court by rule properly promulgated. This is necessary in order that the business may be dispatched in an orderly way. Otherwise counsel and litigants cannot know with any certainty what judge will try their causes. The remarks in *State ex rel. Nissler* v. *Donlan*, though by way of digression, are altogether pertinent. A rule properly promulgated is the only way by which unseemly conflicts of authority may be averted. I am also of the opinion that, if the judges do not apportion the business as the statute requires, this court in a proper case may interfere and apportion it for them.

Rehearing denied May 16, 1914.

STATE EX REL. WOOD, RELATOR, *v.* BOARD OF COUNTY COMMISSIONERS, RESPONDENT.

(No. 3,464.)

(Submitted March 27, 1914. Decided April 22, 1914.)

[140 Pac. 728.]

Mandamus—New Counties—Creation—Petitions and Counter-petitions — Sufficiency — Verification — Evidence — Board of County Commissioners—Rehearing.

New Counties—Creation—Petitions—Signatories—Qualifications.

1. Under Chapter 133, Laws of 1913 providing that when it is sought to divide any counties and form a new one, a petition signed by at least one-half of the qualified electors of the proposed new county, whose names appear on the registration books at the last general election, shall be presented to the board of county commissioners of the county from which the largest area is proposed to be taken, and that where the proposed county is to be formed from two or more counties separate petitions shall be presented from the territory taken from each, and each petition shall be signed by at least one-half the qualified electors of each portion, a petition for a new county to be carved out

of two existing counties need only be signed by one-half of the qualified electors of the territory proposed to form the new county, as shown by the registration books used at the last general election.

Same—Counter-petitions—Burden of Proof.

2. A counter-petition for the exclusion of territory from a proposed new county must contain the signatures of at least fifty per cent of the qualified electors resident in the territory sought to be excluded, and the burden is on the counter-petitioners to show that fact on the hearing.

Same—Counter-petition—Verification—Proof.

3. A verification to a counter-petition asking for the exclusion of territory sought to be included in a proposed new county, which merely averred that each affiant believed that the counter-petition was signed by at least fifty per cent of the qualified electors of the territory sought to be excluded, was of no probative value as to the fact alleged.

Same—Verification—Not Evidence of Facts Alleged.

4. The New Counties Act does not require counter-petitions for the exclusion of territory from a proposed new county to be verified nor authorize the acceptance of a verification as probative; hence a verification *held* not to be evidence of the facts alleged therein.

Same—County Commissioners—Rehearing—Denial Proper.

5. After an order calling an election to determine whether a new county should be created had been made and the board of county commissioners clothed with jurisdiction had adjourned *sine die*, it was without power to grant a rehearing.

Original application for writ of mandate, by the state, on the relation of Royal S. Wood, against the board of county commissioners of Teton county, to compel respondent board to reconsider certain petitions in connection with the creation of Toole county. Dismissed.

Messrs. Norris & Hurd, for Relator, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

Messrs. Freeman & Thelen and *Mr. Phil. I. Cole,* for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Certain petitions for the creation of Toole county out of portions of Teton and Hill counties were presented to the board of county commissioners of Teton county and set for hearing on January 8, 1914. On that date the board convened, heard the petitions, held the same to be sufficient, and ordered an election for April 25, 1914. The relator challenges the proceedings upon the grounds: (1) That the petition from Hill

county was not signed by fifty per cent of the qualified electors resident in the territory described therein; and (2) that on January 7, 1914, a counter-petition, seeking the exclusion of a portion of such territory, was duly filed, signed by more than one-half of the qualified electors resident in such portion which counter-petition the board refused to grant. If the relator's position is sound in either respect, the proposed new county cannot, for lack of sufficient valuation, be created. A peremptory writ of mandate is sought to compel the board to reconvene and give proper legal effect to the counter-petition for exclusion and to the original petition from Hill county, by granting the one and denying the other.

The specific complaint against the original petition from Hill county is that the territory affected contains not less than 800 resident qualified electors; that said petition after allow-
[1] ing for withdrawals therefrom, had but 371 signers, which was less than fifty per cent of the qualified electors; and that the board, in determining said petition to be sufficient, relied, not upon the statutory verification thereto, but upon the testimony produced, and instead of ascertaining the number of qualified electors resident in the territory affected on January 8, 1914, used as a basis the registration list of Hill county for the general election of 1912. To establish the contention that this proceeding was inadequate, reliance is placed upon the decision of this court in *State ex rel. Lang* v. *Furnish*, 48 Mont. 28, 134 Pac. 297. The most cursory examination of the Furnish decision will demonstrate that it is rigidly confined to counter-petitions for exclusion, and does not in terms or effect apply to original petitions for the creation of new counties. There was a reason for this, and it may be found in the language of the Act then and now under consideration. We remarked: "The legislature could have said that a counter-petition to exclude territory should be signed by fifty per cent of the qualified electors thereof whose names appear upon the great register, but it did not say that, and the conclusion must be that it did not mean that, unless by such a conclusion the statute is rendered

inoperative or unconstitutional." Now, whatever may have been the reasons, that is what the legislature did say, in effect, in prescribing the character of the original petitions, for the Act in express terms provides: "Whenever it is desired to divide any county or counties and form a new county out of a portion of the territory of such then existing county or counties, a petition shall be presented * * * to the board of county commissioners of the county from which the largest area of territory is proposed to be taken. * * * Such petition shall be signed by at least one-half of the qualified electors of the proposed new county, whose names appear on the official registration books used at the general election held therein last preceding the presentation of said petition." The unmistakable meaning of this language is claimed to be destroyed by the proviso immediately following, *viz.*: "That, in cases where the proposed new county is to formed from portions of two or more existing counties, separate petitions shall be presented from the territory taken from each county; and each of said separate petitions shall be signed by at least one-half of the qualified electors of each of said proposed portions"—but it is quite clear to our minds that this is a subsidiary, precautionary provision designed, not to change the qualifications of the signers as fixed in the principal clause and which the legislature apparently thought it unnecessary to repeat, but to guard against another possibility. To illustrate by the present case: It could be maintained, without the above proviso, that the proceedings to create Toole county were properly initiated if the petition or petitions for the whole territory to be embraced in the proposed new county contained the signatures of fifty per cent of the registered electors thereof, notwithstanding that fifty per cent of such electors residing in the portion to be taken from Hill county had not expressed their assent. The obvious purpose of the proviso was to prevent any such situation.

That no distinction was intended to be based upon the creation of a new county wholly out of one old county, on the one hand, or out of two or more old counties, on the other, is suggested

by the requirements of the Act touching the manner of verifying the petitions. "There shall be attached to * * * said petition or petitions the affidavit of three qualified electors and taxpayers within each county sought to be divided, to the effect * * * that it is signed by at least one-half of the qualified electors of the proposed new county, or of the proposed portion thereof taken from each existing county, where the proposed new county is to be formed from portions of two or more existing counties, * * * and that each of such persons so signing was a qualified elector of such county therein sought to be divided, at the date of such signing." The reference here is undoubtedly to such qualified electors as are eligible for signers; else the verification is useless. But unless we arbitrarily strike from the Act the provision that the petition must be signed by at least one-half of the registered electors of the proposed new county, it follows that, as regards the creation of a new county out of one old one, the signers must be (a) qualified electors of the territory affected, (b) whose names appear on the registry for the preceding general election, and (c) who constitute in number fifty per cent of all such persons. This, in effect, was the holding in *State ex rel. Bogy* v. *Board of County Commissioners*, 43 Mont. 533, 117 Pac. 1062; and, if it be true of a petition for the creation of a new county out of one old county, the identity of language used makes it true where the new county is sought to be created out of more than one old county. The same consideration applies with regard to what the board must find, *viz.*: "That said petition contains the genuine signatures of at least one-half of the qualified electors of the proposed new county, or in cases where separate petitions are presented from portions of two or more existing counties as herein required, that each of said petitions contains the genuine signatures of at least one-half of the qualified electors of that portion," *etc.* This language, standing alone, would under *State ex rel. Lang* v. *Furnish, supra,* be held to refer to persons possessing the constitutional qualifications of an elector, but it does not stand alone. It has distinct

relation and reference back to the original requirement of the Act touching the qualifications of signers. (*State ex rel. Bogy* v. *Board of County Commissioners, supra.*) As these must, in the case of a new county sought to be created wholly out of an old county, be electors who have registered, so they must be in the case where the new county is sought to be created out of portions of two or more old ones, because there is no warrant in the language for discrimination.

The county commissioners of Teton county were therefore correct in adopting the previous registration as a criterion to determine whether a sufficient number of persons had signed the original petition from Hill county. The verification to the petition, and the evidence taken, alike disclose, and the relator does not question, that the 371 persons whose names remain upon the Hill county petition after allowing all withdrawals constituted at least fifty per cent of the qualified electors of the territory affected who had registered for the preceding general election. The relator's first contention, therefore, cannot be upheld.

2. It was not only necessary that the counter-petition in ques-
[2] tion contain the genuine signatures of at least fifty per cent of the qualified electors resident in the territory sought to be excluded, but the burden was upon the counter-petitioners to show that fact upon the hearing. (*State ex rel. Lang* v. *Furnish, supra.*) No effort whatever was made to sustain this burden, but, as stated by counsel, the counter-petitioners "stood upon their petition." Not only did they do this, but vigorous resistance was offered on their behalf to the examination of two of the witnesses whose oath effected such verification. Much might be said concerning the attitude of these persons regarding the proceedings, and it is insisted that the board was justified in treating the verification as valueless on account of their testimony and conduct at the hearing. This it is not necessary to conclude, because the verification was valueless for other reasons. In the first place, it does not assert that the counter-petition is signed by at least fifty per cent of the qualified electors of the territory described, but merely that each of the verifiers

[3] believes such to be the case. Assuming that such verification might suffice to give status to a pleading or paper required by law to be verified, it could not under the most liberal view, be taken as evidence of anything more than the belief of the verifiers. But it is the fact itself that is of importance, and proof of a mere belief of that fact does not suffice. (*Benepe-Owenhouse Co.* v. *Scheidegger*, 32 Mont. 424, 80 Pac. 1024.)

Moreover, the New Counties Act does not require that the counter-petitions for exclusion of territory be verified. Attention was called to this fact in the *Furnish Case*, where it was [4] said they could not be taken as *prima facie* evidence that the signers constituted fifty per cent of the qualified electors of the territory sought to be excluded, without an affidavit to that effect. We now go further and say that, since the statute neither requires such verification nor authorizes the acceptance of it as probative, the counter-petition, though verified, cannot be given any evidentiary value. The functions of an affidavit in this state are defined by Article II, Chapter III, Title III, Part IV, of our Revised Code of Civil Procedure, and their use for giving *prima facie* verity to pleadings and papers is confined to such as are required to be verified. While, as remarked in *State ex rel. Arthurs* v. *Board of County Commissioners*, 44 Mont. 51, 118 Pac. 804, the proceedings under the New Counties Act are in a sense informal, and the board is to be viewed as the people's forum where the layman can be heard without the aid of counsel; yet the matter is by no means haphazard. The petitions and counter-petitions are in the nature of pleadings, final action is taken when the election is ordered, such final action is made to depend upon evidence, and the evidence must be of a character to warrant it. In the absence of statutory authority, an affidavit is not such evidence. (2 Cyc. 35; 1 R. C. L. 766.)

The relator insists, however, that the verification of the counter-petition is *prima facie* evidence under the *Arthurs Case;* but this is a misapprehension of the purport of that decision. No question of proof was before the court in that case; the

question being whether the counter-petition was sufficient as such. The body of the counter-petition failed to state certain facts, but these were stated in the verification, and we said that the body could be aided by the verification so as to make a complete statement of facts; and so we should hold concerning the counter-petition at bar, had its sufficiency as such been attacked. The question here is upon the *quantum* of proof, and for that the *Arthurs Case* is no authority.

Since it was not shown to the board that fifty per cent of the qualified electors of the territory sought to be excluded had signed the counter-petition in question, the denial of it was proper.

3. After the order calling the election had been made and [5] the board had adjourned *sine die,* a petition for rehearing was addressed to the board and filed on March 5, 1914, wherein it was offered to show, among other things, that the number of qualified electors resident in the territory sought to be excluded was not to exceed 64, and that the counter-petition for exclusion contained the genuine signatures of 42 of such electors. This petition was denied, and rightly so. We know of no provision or principle authorizing the granting of a rehearing by the board in such cases. The order for the election had gone forth; it was valid on the facts presented; and there was nothing further for the board to do.

The alternative writ heretofore issued herein is vacated, and the proceedings are dismissed at the relator's costs.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. HALK, APPELLANT.

(No. 3,376.)

(Submitted May 1, 1914. Decided May 7, 1914.)

[141 Pac. 149.]

Criminal Law—Homicide—Burden of Proof—Instructions—Cause of Death—Expert Testimony—Cross-examination.

Homicide—Justification—Burden of Proof—Instructions.

1. The burden of proof in a criminal case is never upon defendant to disprove the facts necessary to establish the crime with which he is charged; hence appellant, charged with homicide, was in no position to complain of an instruction which by failing to give the rule embodied in section 9282, Revised Codes, to the effect that the burden of proving circumstances of mitigation, justification or excuse devolves upon defendant, impliedly told the jury that the burden did not rest upon him at any stage of the case.

[As to burden of proof on issue of self-defense in homicide case, see note in Ann. Cas. 1912C, 47.]

Same—Cause of Death—Cross-examination.

2. Where defendant contended that the death of deceased was due to lack of proper treatment and not to the wound inflicted by him, a question asked a physician on cross-examination, who had testified as to the character of the wound, the condition in which he found deceased, *etc.*, whether the injury would have proved fatal in a few hours if deceased had received prompt and suitable surgical treatment, was properly excluded.

Same—Cause of Death—Hypothetical Question—Proper Exclusion.

3. Offered testimony by a physician other than the one who attended deceased, that if different treatment had been resorted to death might not have ensued, *held* immaterial, it not having had a tendency to show that death resulted solely owing to improper treatment.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

ALBERT F. HALK was convicted of murder in the second degree, and appeals from the judgment and an order denying him a new trial. Affirmed.

Cause submitted on briefs of counsel.

Mr. Chas. G. Colby, for Appellant.

Mr. D. M. Kelly, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of murder in the second degree, and sentenced to imprisonment for a term of 100 years. He has appealed from the judgment and an order denying his motion for a new trial.

The brief submitted by counsel contains many assignments alleging error in the instructions and in the court's rulings in excluding evidence offered by the defendant. Of these only three are referred to in the argument. In view of the nature of the charge and the severity of the sentence imposed, however, we have made such examination of them all as has been possible without the assistance of oral or printed argument. We have found no substantial error in any of them. We shall not give special notice to any of them, other than those argued by counsel.

1. The defendant shot the deceased, Thomas Slonski, in the early morning of August 9, 1912, inflicting a wound from which death ensued the following morning. The wound was through the left thigh, the bullet in its course breaking and splintering the bone, severing the femoral artery, and severely lacerating the muscles as it passed out. At the trial it was sought to justify the shooting on the ground of self-defense. Some effort was also made to show that the wound was not mortal, but that the death of the deceased was caused solely by the maltreatment of the attending physician.

In paragraph 20 of the charge the term "malice" was defined [1] as follows: "Malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. The term 'malice' is not restricted to spite or malevolence toward the deceased in particular, but is understood to mean that general malignity and recklessness of and toward the lives and personal safety of others which proceed from a

heart void of a just sense of social duty, and fatally bent on mischief. And whenever the fatal act is committed deliberately the law presumes that it is done in malice." Complaint is made that this definition is not sufficient, because the court omitted to add to it the following: "And it behooves the prisoner to show, from the evidence, or by inference from the circumstances of the case, that the offense is of a mitigated character, and does not amount to murder." The first three sentences of the paragraph comprise the whole of section 8291 of the Revised Codes. The latter portion of it, it will be noted, is taken from the text of Greenleaf on Evidence, the court omitting the final clause of the last sentence. (3 Greenleaf on Evidence, 16th ed., sec. 144.) The rule, as stated in the last sentence, including the omitted clause, is embodied in a modified form in section 9282, Revised Codes, as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

While this section declares the circumstances under which the burden of proof shifts to the defendant, he is not at any time required to bear a greater burden than to go forward with his proofs far enough to create in the minds of the jurors a reasonable doubt as to his guilt. The burden of proof, as these words are used in the criminal law, is never upon the defendant to disprove the facts necessary to establish the crime with which he is charged. It is upon the state from the beginning to the end of the trial. It applies to every element necessary to constitute the crime charged, including mental capacity, and also the motives and impulses which give quality to, and characterize, the act under investigation, when proof of them is necessary. The defendant is entitled to an acquittal, unless his guilt appears from the evidence, considered as a whole, beyond a reasonable doubt. (*State* v. *Brooks*, 23 Mont. 146, 57 Pac. 1038; *State* v.

Peel, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *Davis* v. *United States*, 160 U. S. 469, 40 L. Ed. 499, 16 Sup. Ct. Rep. 353.) This is true whether he introduces evidence or not.

By the omission complained of, and by the failure to submit the rule as embodied in the statute, which the court might properly have submitted, the jury were impliedly told that the burden did not devolve upon the defendant at any stage of the case. We can see no ground for criticism of the instruction.

2. Dr. Kistler, called as a witness by the state, testified as to the character of the wound, the condition in which the deceased [2] was as a result of shock, loss of blood, *etc.*, at the time he was brought to the hospital for treatment. On cross-examination, he was asked as to the treatment he gave deceased. This he described in general terms, stating also that such a wound as that from which the deceased was suffering was not necessarily mortal, the result of it being dependent always upon the physical condition of the particular patient and the length of time elapsing before he obtains proper treatment. He was then asked: "If that injury had had prompt and proper surgical treatment from the first, would it have caused the death of the individual in so few hours?" Upon objection the witness was not permitted to answer. The ruling was proper. The answer, whether "Yes" or "No," would not have reflected in any way upon the question whether the wound was mortal, but merely upon the question whether, if prompt and proper treatment had been administered, the life of the deceased might have been prolonged for a number of hours. Nor would either answer have thrown any light upon the inquiry whether the deceased received prompt and efficient treatment, or who was responsible for the fact that he did not.

3. Dr. Haviland was called by the defendant as an expert. Several questions were put to him, the evident purpose of which [3] was to have him detail the means which, in his opinion, should have been employed to administer relief to Slonski when he reached the hospital. He was not permitted to answer. Thereupon counsel, having enumerated various means of relief

which might be administered under such circumstances, asked the witness to state whether, if they had been applied, the deceased might not have suffered the loss of his leg only, and not of his life. The offer was also excluded. The ruling was correct. It will be observed that the offer was not to show that the death of Slonski was due solely to the maltreatment of the wound by Dr. Kistler, but that, if the course of treatment had been such as the question assumed, the wound would probably not have resulted in death. The testimony of Dr. Kistler, though not very definite, tended to show that the course of treatment applied by him was substantially that assumed by the hypothetical question. Hence, assuming, as counsel contends, that the defendant would have been entitled to an acquittal had it appeared that Slonski's death was due solely to the maltreatment of his wound by Dr. Kistler, and not to the wound itself, the offered evidence did not tend in any way to show this fact.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

LOEFFLER, RESPONDENT, v. DUNNING, APPELLANT.

(No. 3,381.)

(Submitted May 1, 1914. Decided May 7, 1914.)

[141 Pac. 148.]

Work and Labor—Evidence—Sufficiency.

1. In an action for wages due in which defendant, relying upon his motion for nonsuit, declined to introduce any testimony, plaintiff's evidence that there was due him between $400 and $500, *held* sufficiently specific to warrant a verdict for an amount not to exceed $400.

Appeal from District Court, Rosebud County; Geo. W. Pierson, Judge.

ACTION by George Loeffler against J. S. Dunning. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Cause submitted on briefs of counsel.

Messrs. Loud, Collins, Brown, Campbell & Wood, for Appellant.

Messrs. Braz D. Tull and *Mr. Don C. Smith,* for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover $913.80, wages for twenty-three months' work alleged to have been performed by the plaintiff for the defendant at his special instance and request. [1] The answer admits that the work was performed, but alleges that it was done under a special agreement that plaintiff should receive as compensation only his board and maintenance. The answer further alleges that in any event plaintiff's services were not worth more than $15 per month, or a total of $345. By way of counterclaim, the defendant sets forth that he furnished to the plaintiff, at plaintiff's special instance and request, money and goods, wares and merchandise amounting to $722.45, no part of which has been paid except the sum of $345, earned by the plaintiff by his services for twenty-three months at $15 per month. To the answer is attached a statement of the items constituting the counterclaim. In reply the plaintiff admits that he received from the defendant money and goods on account to the amount of $293.75, and denies all the other allegations of the answer. Upon the trial plaintiff testified to the arrangement under which he worked for the defendant; that it was agreed that for the first seven months he should receive the "going wages" for such work in South Dakota, where the work was performed; that the reasonable value of such services was $35 per month, including board; that for the remainder of the

time he was to receive $40 per month and board; that he drew money at different times on account, and, by arrangement with the defendant, he purchased goods for his own use which were charged to and paid for by the defendant; that he did not keep any book account of these items but depended upon the defendant to present a bill therefor; that he could not tell exactly the balance due him, but, after an examination of the items constituting the defendant's counterclaim, he could say that there was due him between $400 and $500; that, as nearly as he could judge, the amount was about $500. At the close of this testimony the defendant moved for a nonsuit. The motion was denied, and, the defendant declining to offer any evidence, the cause was submitted to the jury and a verdict returned for $443. From the judgment entered thereon and from an order denying him a new trial, the defendant appealed.

The only contention made in this court is that the evidence is not sufficiently specific, as to the amount due the plaintiff, to sustain a verdict for any amount or to justify the submission of the cause to the jury. The answer admits that plaintiff had earned $345. To recover more than that amount, the burden was upon the plaintiff to furnish evidence from which the jury could determine the balance with some reasonable degree of certainty. Although there was before the plaintiff an itemized statement of defendant's counterclaim, he was not asked to indicate the particular items with which he admitted he should be charged or those which he disputed, and the best evidence was thereby withheld from the jury. However, we regard the testimony of plaintiff, above, as sufficiently specific to warrant a verdict for $400. In effect he testified that there was due him $400, with the possibility that more than that amount might be due him. In the absence of anything to indicate the contrary, we think this sufficient to justify submitting the cause to the jury for an amount not to exceed $400, and that the evidence will support a judgment for that amount.

The order denying a new trial is affirmed. The cause is remanded to the district court, with directions to modify the

judgment by reducing the amount thereof to $400 as of February 8, 1913, and, as thus modified, it will be affirmed. Each party will pay his costs in this court.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

HILLMAN ET AL., APPELLANTS, *v.* LUZON CAFE CO. ET AL., RESPONDENTS.

(No. 3,377.)

(Submitted April 30, 1914. Decided May 13, 1914.)

[142 Pac. 641.]

Contracts in Writing—Representations—Evidence—Admissibility — Acceptance — Effect — Counterclaim — Rescission — Instructions.

Contracts—Representations—Pleadings and Proof—Irrelevancy.

1. In an action to recover a balance due on the purchase price of a lighting machine, the answer in which alleged affirmatively, among other things, that the contract had been entered into solely upon plaintiffs' representations as to the efficiency of the machine which proved untrue, evidence touching the effect of the plant upon defendants' insurance was irrelevant to the issues, in the absence of allegation as to its effect in that respect.

[As to reversal for variance or technical violation of rule that allegations and proof must agree, see note in Ann. Cas. 1913D, 68.]

Appeal and Error—Presumptions—What not Harmless Error.

2. While prejudice will not be presumed from every erroneous ruling, still, if the effect of a series of such rulings is to tell the jury that evidence of the character referred to in paragraph 1, *supra*, is relevant and important, it may not be said that harm did or could not result.

Contracts—Pleadings—Insufficiency to Raise Issue.

3. The averment in defendants' answer that plaintiffs had represented that the lighting machine "could be run at a given expense for a given length of time" was insufficient to raise an issue so as to admit evidence of a representation that the plant was capable of furnishing light for defendant's establishment at an operating cost of not to exceed a certain sum per month, whereas the actual cost was double that amount.

Same—Representations—Evidence—Admissibility

4. The gravamen of defendants' answer having been that the written contract had been procured by false representations to induce

the purchaser of the lighting plant, parol evidence of such representations was admissible.

[As to parol evidence to explain mercantile and other contracts, see notes in 6 Am. Rep. 678; 28 Am. Rep. 210. As to parol evidence to show warranty outside of contract, see note in 5 Am. St. Rep. 197.]

Same.

5. Under a provision of the contract referred to above, guaranteeing that the machine could perform its work "up to claims," and in the absence of any claims in that respect in the writing, parol evidence of representations by the seller were admissible under a proper pleading.

Same—Acceptance—Effect.

6. Acceptance of a machine with knowledge on the part of the buyer of a particular defect prevents such defect from being available as a defense to an action for the purchase price, though it remains pleadable as a basis for a counterclaim.

[As to performance of executory contract for sale of personalty after discovery of fraud as affecting right to damages, see notes in 7 Ann. Cas. 280; 20 Ann. Cas. 172.]

Same—Counterclaim—Insufficiency.

7. Counterclaim for the return of the purchase money paid for a machine, *held* obnoxious to the rule that the matter alleged must tend to diminish or defeat plaintiff's recovery, and must constitute a cause of action complete within itself.

Same—Retention and Use—Erroneous Instruction.

8. An instruction that retention of the machine and use for any period of time, however short, and whether reasonable or not, constitutes an acceptance, was an erroneous statement of the law, and properly refused.

Same—Rescission—Instruction—Improper Refusal.

9. Where the defense relied on in an action to recover on a written contract of purchase of a lighting plant was in effect a rescission, an offered instruction that a party seeking such relief must act promptly upon the discovery of facts entitling him to rescind was improperly refused.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by J. C. Hillman and A. C. Temple, copartners doing business under the firm name of Montana F. P. Gas Machine Company, against the Luzon Cafe Company, a corporation, and others. From a judgment for defendants and an order denying a new trial, plaintiffs appeal. Reversed and remanded.

Messrs. Reynolds & Collins, for Appellants, submitted a brief; *Mr. Reynolds* argued the cause orally.

The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotia-

tions or stipulations concerning the matter which preceded or accompanied the execution of the instrument. (2 Mechem on Sales, sec. 1254; *Ford* v. *Drake*, 46 Mont. 314, 127 Pac. 1019; *Kelly* v. *Ellis*, 39 Mont. 597, 104 Pac. 873.) In order that misrepresentation shall be sufficient to avoid a contract, "there must be a representation concerning a present or past condition, and not a mere promise as to the future." (2 Mechem on Sales, secs. 870, 871; *Dawe* v. *Morris*, 149 Mass. 188, 14 Am. St. Rep. 404, 4 L. R. A. 158, 21 N. E. 313; *Nounnan* v. *Sutter County Land Co.*, 81 Cal. 1, 6 L. R. A. 219, 22 Pac. 515; *Chicago etc. Ry. Co.* v. *Titterington*, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472; *Arnold* v. *Hagerman*, 45 N. J. Eq. 186, 14 Am. St. Rep. 712, 17 Atl. 93; *Adams* v. *Schiffer*, 11 Colo. 15, 7 Am. St. Rep. 202, 17 Pac. 21; *Koehler* v. *Glaum*, 169 Ill. App. 537; *Truman* v. *J. I. Case Threshing Mach. Co.*, 169 Mich. 153, 135 N. W. 89; *Sallies* v. *Johnson*, 85 Conn. 77, Ann. Cas. 1913A, 386, 81 Atl. 974; *Pedrick* v. *Porter*, 87 Mass. (5 Allen) 324.)

The court erred in refusing to give to the jury plaintiffs' offered instruction No. 4. The rule is well established that after purchaser has received the property which is the subject of a sale, retained it, and used it with knowledge of any defects existing therein, such retention and use of such property is an acceptance thereof. (*Tufts* v. *Mabie*, 7 Kan. App. 129, 53 Pac. 84; *Walter A. Wood M. & R. Machine Co.* v. *Calvert*, 89 Wis. 640, 62 N. W. 532; *Chambers* v. *Lancaster*, 160 N. Y. 342, 54 N. E. 707; *Overman et al.* v. *Nelson*, 15 Ky. Law Rep. 92; *Geo. D. Sisson L. & S. Co.* v. *Haak*, 139 Mich. 383, 102 N. W. 946; *Ellis* v. *Roche*, 73 Ill. 280; *McBride* v. *McClure*, 49 Ill. App. 612; *Logan* v. *Berkshire Apartment House*, 3 Misc. Rep. 296, 22 N. Y. Supp. 776; *Dennis* v. *Stoughton*, 55 Vt. 371.)

If a buyer would rescind, he must act promptly and consistently. If, having knowledge of such fraud as will justify repudiation, he does any act affirming the contract, he cannot afterward rescind. (*Houston* v. *Cook*, 153 Pa. 43, 25 Atl. 622; *Boles* v. *Merrill*, 173 Mass. 491, 73 Am. St. Rep. 308, 53 N. E. 894; *Wilder* v. *Beede*, 119 Cal. 646, 51 Pac. 1083; *Arnold* v. *Hagerman*, 45 N. J. Eq. 186, 14 Am. St. Rep. 712, 17 Atl. 93;

Ruhl v. *Mott*, 120 Cal. 668, 53 Pac. 304; *Ott* v. *Pace*, 43 Mont. 82, 115 Pac. 37.) A purchaser cannot rescind a contract on the ground of misrepresentations, and recover money paid on the purchase price, without it appears that such purchaser relied upon such misrepresentations, was deceived thereby and thus induced to make the contract in question. (*Bowe* v. *Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010, 106 N. W. 1074; *Devlin* v. *Moore*, 64 Or. 433, 130 Pac. 35; *Hutchason* v. *Spinks*, 3 Cal. App. 291, 85 Pac. 132; *Kain* v. *Rinker*, 1 Ind. App. 86, 27 N. E. 328; *Jakway* v. *Proudfit*, 76 Neb. 62, 14 Ann. Cas. 258, 106 N. W. 1039, 109 N. W. 388.) The counterclaim fails to allege that defendants relied upon such alleged misrepresentations, were deceived thereby, and that by reason thereof were induced to make the contract in question, and, therefore, fails to state a cause of action.

Messrs. Loud, Collins, Brown, Campbell & Wood, for Respondents, submitted a brief; *Mr. Loud* argued the cause orally.

Conceding that the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning the matter which preceded or accompanied the execution of the instrument, we submit that there is a well-known exception, which is that in an action for the purchase price of a machine, or other personal property, bought under a written contract, it may be shown by parol, as a matter of defense, that the contract was entered into by reason of false and fraudulent representations. (See *McCormick Harvesting Mach. Co.* v. *Williams*, 99 Iowa, 601, 68 N. W. 907; *Geo. Barrie & Son* v. *Frost*, 105 Ill. App. 187; *Thomas* v. *Grise*, 1 Penne. (Del.) 381, 41 Atl. 883; *Jewett* v. *Carter*, 132 Mass. 335; *Holbrook* v. *Burt*, 39 Mass. (22 Pick.) 546; *Langley* v. *Rodriguez*, 122 Cal. 580, 68 Am. St. Rep. 70, 55 Pac. 406; *Clinch-Valley Coal etc. Co.* v. *Willing*, 180 Pa. 165, 57 Am. St. Rep. 626, 36 Atl. 737; *Lawrence* v. *Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382; *Henderson* v. *San Antonio etc. R. R. Co.*, 17 Tex. 560, 67 Am. Dec. 675.) While we concede that it was necessary for the respondents to act within a reason-

able time after discovery by them that the machine had been misrepresented, we insist that what is a reasonable time under the facts and circumstances appearing in evidence in the case is a question for the jury. (*Wilder* v. *Beede,* 119 Cal. 646, 51 Pac. 1083; *Peabody* v. *Fellows,* 181 Mass. 26, 62 N. E. 1053.)

MR. JUSTICE SANNER delivered the opinion of the court.

Action to recover the unpaid balance of the purchase price of a certain gasoline lighting machine installed by the plaintiffs in the Luzon Cafe at Billings, under a written contract made with the defendant company on September 2, 1911. The price stipulated was $315. The complaint alleges performance of the contract by the plaintiffs, and nonperformance by the defendant company, save that it accepted the machine and paid $78.75 thereon.

The answer admits the payment of $78.75 on the machine, denies all the other allegations of the complaint, and alleges affirmatively that the contract was entered into solely upon the representations that the machine "could be run at a given expense for a given length of time," and without refilling with gasoline in the night-time; that the machine has to be refilled with gasoline at night in order to supply the lights required in the business of the defendant company, and that, in consequence of this, the said plant is useless and had to be abandoned. An alleged counterclaim is also set forth, to which attention will be hereafter directed.

The cause was tried to a jury and the issues were found against the plaintiffs, the defendant company also being awarded $78.75 upon its counterclaim. From the judgment entered upon the verdict and from an order denying a new trial plaintiffs have appealed. Twenty-three alleged errors are assigned, and these we shall group and consider as follows:

Assignments I, VI, XI and XII question the propriety of certain rulings admitting evidence touching the effect of the lighting plant upon the defendant company's insurance. The [1] contract does not contain any stipulation or warranty that the outfit would not affect the insurance; nor is it alleged in

the pleadings that the outfit did affect the insurance or that the contract was entered into upon any representations in that regard. The evidence was therefore irrelevant to the issues. Indeed, counsel for defendants, recognizing this, say in their brief: "We believe that this testimony was immaterial, and we are willing to concede that appellants' objection to it should have been sustained by the court and the evidence excluded. But, conceding the error in the court's ruling, we insist that the record discloses beyond question that no prejudice resulted to the appellants therefrom." We regret that complete assent cannot be given to the statement last made. The record un-
[2] happily does not disclose beyond question, or even suggest, that no prejudice resulted from the admission of this evidence. On the contrary, it was of a character well calculated to direct the minds of the jury to a false consideration which, if entertained, could be regarded as of commanding importance. While prejudice will not be presumed from every erroneous ruling, still if the effect of a series of rulings is to submit evidence to the jury, of a matter of potential influence and under circumstances indicative of real importance in the case, it is a gratuity to say that no harm did or could result.

The rulings presented by assignments V, VII and VIII are of like character. By them the defendants were permitted to prove
[3] that as an inducement to the execution of the contract, plaintiffs represented the lighting plant as capable of furnishing the light required at an operating cost of not to exceed $35 per month, whereas the actual cost of its operation was double that amount. The contract contains no such warranty and the pleadings allege no such representation. The only suggestion of any such thing is the averment of a representation that the plant "could be run at a given expense for a given length of time," but this is obviously inadequate to raise any issue.

Assignments II, III, IV, IX and X also relate to rulings upon evidence; but we find no prejudicial error in any of them. Under them, however, as well as under all the other assign-
[4] ments relating to evidence, it is urged that no testimony of

alleged representations, whether pleaded or not, was admissible because the written contract superseded all prior negotiations between the parties and presumably contains the full text of their agreement. The plaintiffs mistake the full force of defendants' position, which is: that the contract was procured by false representations. (*Sathre* v. *Rolfe,* 31 Mont. 85, 77 Pac. 431; *McDonald* v. *Goodkind,* 22 Mont. 491, 56 Pac. 967; 2 Elliott on Contracts, p. 968, sec. 1650.) Aside from that, how- **[5]** ever, there was a valid reason for the admission of evidence of such representations as were properly pleaded, in the terms of the contract itself. It provides: "Party of the first part guarantees * * * that with the proper management it [the machine] is capable of doing first-class work, up to claims, conditioned that after starting the machine, the party of the second part will follow the directions," *etc.* What claims? None are made in the contract, and unless the stipulation that the machine shall be "up to claims" is meaningless, the reference must be to such claims as were made orally upon its behalf. The answer alleges one of such claims to have been that the machine would run all night without refilling, and that in this respect it altogether failed. So far as the testimony tended to show that such were the facts, we think no just objection was or could be made.

The sufficiency of the evidence as a whole is presented by assignment XXII. No good purpose would be served by discussing this matter at length. Three questions of fact were presented, *viz.:* Whether the contract was made upon plaintiffs' representation of the machine as capable of running all night without refilling; whether the plaintiffs installed the machine called for by the contract; and whether there was an acceptance of the machine by the defendants. Upon the first of these propositions the evidence was in irreconcilable conflict; upon the second there was a bare technical sufficiency; and upon the third, it is sufficient to say that an acceptance of the machine with knowledge of the particular defect in question is very strongly suggested by the testimony. Of course, if there **[6]** was such acceptance, its result was to prevent such defect

from being available as a defense to an action for the purchase price, though it remained pleadable as a basis for counterclaim. (*Best Mfg. Co.* v. *Hutton, ante,* p. 78, 141 Pac. 653.)

It is contended, however (assignments XX and XXI), that [7] the subject of purchase money paid was not before the court as a basis for counterclaim; that error occurred in submitting it to the jury under instruction No. 11, and that the affirmative award of $78.75 to defendants was without justification. With this contention we are constrained to agree. The counterclaim, so far as it pertains to this subject, reads as follows: "For a further defense, and by way of counterclaim, the defendants herein complain and allege * * * that on or about the 2d day of September, 1911, they made an agreement with the plaintiffs for the installation of a certain gas engine; that said gas engine failed to perform the work claimed for it, in that it failed to run through the night without refilling; that the said defendants herein notified said plaintiffs of said defect by registered mail, that said plaintiffs wholly failed to remedy the defect and that the defendants subsequently notified the plaintiffs herein that under the conditions above stated the machine could not be accepted." These averments were obviously intended as preliminary to the allegation which follows asserting a counterclaim on account of an attachment issued out of the justice's court upon a suit for the purchase price, and in support of which no evidence whatever was offered at the trial. The present theory that the averments above quoted furnish any support for the return of the purchase money paid is untenable for several reasons. It will be readily observed that no mention whatever is made of any moneys paid upon the purchase price; that the failure of the machine to run all night without refilling is stated, not as a violation of representations made anterior to the contract relied on by plaintiffs, which was the theory of the defense proper, but as a breach of an agreement between the parties; yet neither by statement nor reference does it appear what the agreement was or that it is the contract relied on by plaintiffs.

Regarded as a counterclaim for a return of the purchase moneys paid, the pleading is obnoxious to the elementary rule that the matter alleged must tend to diminish or defeat the plaintiff's recovery (Rev. Codes, sec. 6541), and must constitute a cause of action complete within itself. (*Babcock* v. *Maxwell*, 21 Mont. 507, 512, 54 Pac. 943; *Anaconda C. M. Co.* v. *Thomas*, 48 Mont. 222, 137 Pac. 380.)

Assignments XIII, XIV, XV and XVI complain of refusal of the court to instruct the jury conformable to plaintiffs' requests Nos. 3, 4, 9 and 10, respectively. All of these, with the exception of No. 9, were properly refused. No. 3 because it was misleading; it restricted the jury to the written contract and in effect excluded the real defense that the outfit did not meet the representations upon which the contract itself was procured. The objection to No. 4 is that under it retention **[8]** and use for any period of time, however short, whether reasonable or not, would constitute an acceptance; this is not correct. No. 10 sought to submit the sufficiency of defendants' notice; but that was not in the case because the evidence discloses a waiver by plaintiffs of any failure therein. Offered **[9]** instruction No. 9 should have been given. Whatever technical view may be taken of defendants' position, it cannot be gainsaid that there was a formal contract between the parties. This the defendants sought to avoid because of the failure of the machine to meet certain alleged representations—in effect a rescission. It is undoubtedly the rule that a party seeking such relief must act promptly upon the discovery of facts authorizing it (Rev. Codes, sec. 5065); and while it is true that it is for the jury to say under all the circumstances whether promptness was exercised, there was nothing in the offered instruction to infringe that right, and the defendants were at liberty to have the matter enlarged upon by further instruction if they so desired.

Assignments XVII, XVIII and XIX relate to the giving of instructions 8, 9 and 10. These instructions are not open to the objections stated in the record.

The contention that the verdict is against law because contrary to instructions 1 and 3 is disposed of by what has been said above.

The judgment and order appealed from are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

THIEN ET AL., APPELLANTS, *v.* WILTSE, RESPONDENT.

(No. 3,378.)

(Submitted May 4, 1914. Decided May 15, 1914.)

[141 Pac. 146.]

Liquor Licenses—Appeal to District Court—Jurisdiction—Undertaking not Required.

1. Chapter 92, Laws of 1911, provides that the protestants against the issuance of a liquor license in a place not within the corporate limits of a city or town, or the applicant therefor, may appeal to the district court, "the appeal to be taken and heard in the same manner as appeals from justice courts." *Held* that the filing of an undertaking is not necessary to confer jurisdiction upon the district court to entertain such an appeal.

Appeal from District Court, Musselshell County; Charles L. Crum, Judge.

THE board of county commissioners of Musselshell county, over the formal protest of Henry Thien and others, granted Manuel Wiltse a license to engage in the liquor business. The protestants thereupon filed their notice of appeal to the district court, but failed to file an undertaking. From an order dismissing the appeal, the protestants appeal. Reversed and remanded.

Messrs. Boarman & Boarman, for Appellants, submitted a brief; *Mr. Henry C. Smith,* of Counsel, argued the cause orally.

If the law were as applicant contends, and an undertaking were necessary, he has, by filing an answer to the amended re-

monstrance in the district court, entered a general appearance whereby he has waived all defects. (*Robertson* v. *O'Reilly*, 14 Colo. 441, 24 Pac. 560; *Oppenheimer* v. *Guckenheimer*, 34 Fla. 13, 15 South 670; *Kasson* v. *Brocker Estate*, 47 Wis. 79, 1 N. W. 418; *Schwabacher* v. *Wells*, 1 Wash. Ter. 506; *Sprague* v. *Luther*, 7 R. I. 581; *Hibernia Savings etc. Soc.* v. *Lewis*, 111 Cal. 519, 44 Pac. 175; *In re Graye*, 36 Mont. 394, 400, 93 Pac. 266; *Hosoda* v. *Neville*, 45 Mont. 310, 313, 123 Pac. 20.) In *Pearce* v. *Swan*, 1 Scam. (Ill.) 266, the court said: "Taking the appeal, executing the bond, and delivering the papers to the circuit court, are the means provided by law for transferring the cause from the justice and constable to the circuit court. These measures are in the nature of process to remove the cause from the inferior to the superior court. When process by which a court obtains jurisdiction of a cause is irregular, and no objection is made, the irregularity is waived. The irregularity is not like the case of a defective jurisdiction over the subject matter; for the statute gives jurisdiction to the justice and constable in the first instance and to the circuit court by appeal." See, also, *Thompson* v. *Lea*, 28 Ala. 453, a case which we regard as decisive of the instant case.

Messrs. Carothers & Jones, *Mr. C. H. Tyler* and *Mr. G. J. Jeffries*, for Respondent, submitted a brief; *Mr. Jeffries* argued the cause orally.

Our supreme court held in *Re Davis' Estate*, 27 Mont. 235, 70 Pac. 721, that a motion to dismiss an appeal presented but two questions, *viz.*, whether the appeal lies, and if it does whether the appellant has failed to secure it by neglecting to prosecute it, as required by the statute and by rules of the court. The statutory provisions relating to appeals must be strictly complied with to confer jurisdiction upon the appellate court. (*State ex rel. Hall* v. *District Court*, 34 Mont. 112, 115 Am. St. Rep. 522, 9 Ann. Cas. 728, 85 Pac. 872; *Wood* v. *Superior Court*, 67 Cal. 115, 7 Pac. 200; *McCracken* v. *Superior Court*, 86 Cal. 74, 24 Pac. 845; *Moffat* v. *Greenwalt*, 90 Cal. 368, 27 Pac. 296; *Creek* v. *Bozeman Waterworks Co.*, 22 Mont. 327,

56 Pac. 362; *Washoe Copper Co.* v. *Hickey*, 23 Mont. 319, 58 Pac. 866.) In *State ex rel. Hall* v. *District Court, supra*, which involved a motion to dismiss an appeal upon several grounds, among which were that the pretended appeal had not been perfected as required by law, the court held that the provisions of the statute relative to appeal are mandatory, and "that a party wishing to appeal from a justice of the peace court must pursue the statutory method strictly, and a failure to do so does not divest the justice of the peace court of its jurisdiction."

The supreme court has no jurisdiction to entertain the appeal unless the appellant files a proper undertaking on appeal. (*State* v. *Napton*, 24 Mont. 450, 62 Pac. 686.) Even a *bona fide* attempt to comply with the statute does not confer jurisdiction, where the bond is fatally defective. (*Creek* v. *Bozeman Waterworks Co.*, 22 Mont. 327, 56 Pac. 362; *Putman* v. *Putman*, 3 Ariz. 182, 24 Pac. 320; *Marx* v. *Lewis*, 24 Nev. 306, 53 Pac. 600.)

In special proceedings a bond on appeal is required. "A bond must be given on appeal taken in a special proceeding, where the law provides that it shall be taken similarly as an appeal from a decision by a court of general jurisdiction, and a bond is there required." (1 Ency. of Pl. & Pr. 965, note 3; *In re Beckwith*, 15 Hun (N. Y.), 326; *State* v. *Fitch*, 30 Minn. 532, 16 N. W. 411.)

The filing of an appeal bond is jurisdictional and cannot be waived. (2 Cyc. 849.) It has been decided that failure to file an appeal bond within the prescribed time is a jurisdictional defect that cannot be waived. (*Traders' Safe & Trust Co.* v. *Calow*, 77 Ill. App. 146; *Lyell* v. *Guadaloupe County*, 28 Tex. 57.) "All the requirements of the statute for taking an appeal are deemed jurisdictional and must be strictly complied with, whatever be the method named." (2 Ency. of Pl. & Pr. 16.) "Neither the appellate nor the trial court can dispense with statutory security." (1 Ency. of Pl. & Pr. 966; *Architectural Iron Works* v. *City of Brooklyn*, 85 N. Y. 652.) Parties cannot waive the giving of a bond, as that would be equivalent to giving jurisdiction by consent. (*Santom* v. *Ballard*, 133 Mass. 464; *Folsom* v. *Cornell*, 150 Mass. 115, 22 N. E. 705; *Hen-*

derson v. *Benson,* 141 Mass. 218, 5 N. E. 314.) The failure to file an appeal bond within the time prescribed by statute is not such a defect as will be cured by an agreement for submission. (*Ten Brook* v. *Maxwell,* 5 Ind. App. 353, 32 N. E. 106.) An express stipulation will not suffice to confer jurisdiction. (*Marx* v. *Lewis,* 24 Nev. 306, 53 Pac. 600.)

MR. JUSTICE SANNER delivered the opinion of the court.

By an order of the board of county commissioners of Musselshell county, entered over the formal protest of Henry Thien and others, a license to engage in the retail liquor business at Ryegate was authorized to be issued to the respondent, Manuel Wiltse. Thereupon the protestants filed their notice of appeal to the district court, but gave no undertaking, and for want of an undertaking the district court, holding itself to be without jurisdiction, dismissed the appeal, and entered judgment accordingly.

The question presented is whether the filing of an undertaking [1] is necessary to confer jurisdiction upon the district court to entertain an appeal such as was attempted in this proceeding. The statute invoked by both sides is Chapter 92, Laws of 1911, and its provisions with reference to an appeal from the action of the board are as follows: "From the decision of the board * * * the applicant * * * or the protestants * * * may appeal to the district court. * * * The appeal shall be taken and heard in the same manner as appeals from justice courts to the district court, except that the appeal shall be heard if possible within thirty days from the time of filing in the district court, and the same shall be determined without delay." The Code provisions touching appeals from justices' courts are to the effect, that an appeal lies from a judgment (Rev. Codes, sec. 7121), and from a judgment only (*State ex rel. Cobban* v. *District Court,* 30 Mont. 93, 75 Pac. 862; *Burch* v. *Roberson,* 47 Mont. 456, 132 Pac. 1132); it is taken by filing a notice of appeal with the justice and serving a copy thereof on the adverse party or his attorney (Rev. Codes, sec. 7121, Amended Laws 1911, p. 8); it is not effectual for any

purpose, unless an undertaking is filed (Rev. Codes, sec. 7124); and it must be tried anew in the district court (Rev. Codes, sec. 7122). It is not without significance that, under these provisions, an appeal from justices' courts presents three defined stages: (1) The taking which occurs when notice of the proper character is properly filed and served. This is clear, not only from the language of the statute itself, but from the decisions of this court. (*State ex rel. Rosenstein* v. *District Court*, 41 Mont. 100, 102, 21 Ann. Cas. 1307, 108 Pac. 580.) (2) The perfecting or rendering effectual which occurs upon the filing of the undertaking. That this is no part of the taking but presupposes the taking, and is a distinct step beyond it, is clear from the fact that the appeal may be preserved, notwithstanding the undertaking is defective or irregular, if a good one be substituted at or before the hearing of the motion to dismiss (sec. 7128, Rev. Codes; *Marlowe* v. *Michigan Stove Co.*, 48 Mont. 342, 137 Pac. 539), and from the fact that, after notice and undertaking have been filed, the appeal may nevertheless be rendered ineffectual by failure of the sureties to justify after exception on the part of the respondent. In *Morin* v. *Wells*, 30 Mont. 76, 75 Pac. 688, this court, discussing such a situation, said: "While respondent could not divest the court of the jurisdiction given it by the appeal, yet he could render the appeal ineffectual in case he saw fit to insist upon his exceptions to the sufficiency of the sureties, provided that his objections be not obviated as prescribed by the statute. * * * The appeal * * * was perfected, subject only to the action of respondent." The distinction between the taking and the perfecting of an appeal under statutes similar to our own is clearly recognized by the supreme court of California: "It is contended, however, that the appeal in this case was not taken within sixty days after the rendition of the judgment, because no undertaking on appeal was filed within that period of time. An appeal is taken when a notice of appeal is served and filed. (Code Civ. Proc., sec. 940.) The filing of an undertaking perfects an appeal, but it is not a part of the taking in the statutory sense." (*Perkins* v. *Cooper*, 3 Cal. Unrep. 279, 24 Pac. 377.) (3) The hearing

which occurs when the trial *de novo* is had in the district court. (*State* v. *O'Brien*, 35 Mont. 482, 491, 10 Ann. Cas. 1006, 90 Pac. 514; *State ex rel. Seres* v. *District Court*, 19 Mont. 501, 504, 48 Pac. 1104.)

Such was the state of the law when Chapter 92, Session Laws of 1911, was enacted, and for many years prior thereto. When, therefore, the legislature provided for appeals like the one in question, and said, not that they should be taken, perfected and heard, but merely "taken and heard," as appeals from justices' courts, it must be presumed that the language was advisedly used, and that no undertaking should be required. In other instances for which an appeal from the board of county commissioners or similar boards is provided, the legislature experienced no difficulty in prescribing an undertaking where the circumstances seemed to require one; as, for instance, an appeal from the allowance or disallowance of a claim against the county (Rev. Codes, sec. 2947), an appeal from the action of the state board of medical examiners in refusing a license to practice medicine (Rev. Codes, sec. 1588), or an appeal from the refusal of school authorities to excuse a child from attendance in certain cases (Laws 1913, p. 256, sec. 1100). It is a well-established rule that appeals are statutory, and the appellant must proceed as the statute requires (*State ex rel. Hall* v. *District Court*, 34 Mont. 112, 115 Am. St. Rep. 522, 9 Ann. Cas. 728, 85 Pac. 872); this is especially true with regard to appeals from bodies, such as a board of county commissioners (*In re Searles*, 46 Mont. 322, 127 Pac. 902); and a corollary to it is that the appellant is not obliged to do more than the statute prescribes.

We are confirmed in the conclusion that no bond is required upon appeals of this character to the district court by the further consideration that the legislature cannot be presumed to have intended an impossibility; and strict compliance with Chapter 92, Session Laws of 1911, is impossible, if an undertaking must be given as in appeals from justices' courts. We noted above that such appeals are always from judgments in actions at law; but the present proceeding is not an action at law, and presents no judgment. Undertakings on appeal from

a justice's court are fixed and conditioned according to the character of the judgment appealed from, and only the following are authorized: An undertaking in twice the amount of the judgment and costs when the judgment is for the payment of money; an undertaking in twice the value of the property and costs when the judgment is for the recovery of specific personal property; an undertaking for a sum fixed by the justice when it is sought to stay the execution of a judgment for the possession of real estate; and an undertaking in the sum of $100 when the appeal is by the party in whose favor the judgment was rendered. It requires no argument to show that none of these would be appropriate to an appeal such as the one at bar, and no bond for any arbitrary sum to cover costs, as such, has any warrant in the statutes above referred to.

It follows that the construction of Chapter 92, Session Laws of 1911, adopted by the court below, cannot be upheld. The appeal was taken in conformity with the justice practice when the notice was filed; it remains to be heard in accordance with the same statutory provisions.

The judgment appealed from is therefore reversed, and the proceeding remanded to the district court of Musselshell county, with directions to revoke its order of dismissal, and to proceed to the hearing and determination of the appeal.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

KIRK, RESPONDENT, *v.* SMITH, APPELLANT.

(No. 3,383.)

(Submitted May 5, 1914. Decided May 15, 1914.)

[141 Pac. 149.]

Bills of Exception — Presentation for Settlement — Unlawful Extension of Time.

Where, after the expiration of ninety days, the time for presentation of a bill of exceptions for settlement was extended by the trial judge without the consent of the adverse party (Rev. Codes, sec. 7190), the bill was too late and a new trial was properly denied.

[As to effect upon bill of exceptions of neglect of judge to sign it within the time required by law, see note in Ann. Cas. 1913A, 914.]

Appeal from District Court, Hill County; Frank N. Utter, Judge.

ACTION by James Kirk against W. T. Smith. Judgment for plaintiff, and defendant appeals from it and an order denying him a new trial. Affirmed.

Messrs. Nelson & Moore and *Mr. R. E. O'Keefe*, submitted a brief in behalf of Appellant; *Mr. R. E. O'Keefe* argued the cause orally.

Messrs. W. B. Sands, for Respondent, submitted the brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Action for malicious prosecution. Verdict and judgment for the plaintiff. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The judgment itself is not assailed nor in any wise questioned, save as affected by the order denying the motion for new [1] trial. That order is a general one, and must be sustained, if ground therefor appears upon the face of the record. Such ground does appear in the fact that the defendant's bill of exceptions was not presented for settlement within ninety days of the verdict. The time for such presentation was extended

by the trial judge, but without the consent of the plaintiff or his attorney. The case, both as to the facts and the law, is squarely within the decision of this court in *Canning* v. *Fried*, 48 Mont. 560, 139 Pac. 448; and, as the plaintiff insists in this court that the order of the district court was correct, because, among other reasons, there was no bill of exceptions, we see no escape from that conclusion.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

HOWARD, RESPONDENT, v. FLATHEAD INDEPENDENT TEL. CO. ET AL., APPELLANTS.

(No 3,379.)

(Submitted May 2, 1914. Decided May 16, 1914.)

[141 Pac. 153.]

Personal Injuries—Highways—Obstructions—Duty of Counties—Telephone Companies—Erection of Poles—Negligence—Proximate Cause—Evidence—Insufficiency—Instructions—Inapplicability to Facts—Proper Refusal.

Personal Injuries—Negligence—Liability—Proximate Cause.

1. To establish the liability of defendant for personal injuries, it must not only appear that he was negligent, and that the plaintiff was injured, but also that his negligence was the proximate cause of the injury.

[As to proximate and remote causes of injury from negligence, see notes in 50 Am. Rep. 569; 36 Am. St. Rep. 807. As to respective functions of court and jury with reference to questions of proximate cause, see note in Ann Cas. 1913B, 351.]

Same—Highways—Obstructions—Duty of Counties.

2. A county is not required to keep its highways in condition fit for travel for their entire statutory width of sixty feet, its duty being discharged if portions thereof, sufficiently wide to accommodate the travel fairly to be anticipated, are kept in proper condition; the remaining portions may properly be used for purposes inconsistent with their use as driveways, *i. e.*, for piling rocks, constructing drainage ditches, *etc.*

[As to liability of municipality for defects in streets and ways, see notes in 24 Am. Rep. 25; 53 Am. Dec. 92; 9 Ann. Cas. 1156; 11 Ann. Cas. 943.]

Same—Highways—Width—Sufficiency—Jury Question.

3. Whether the portion of a highway graded or otherwise made suitable for travel is of sufficient width to accommodate the public is a question of fact.

Same—Highways—Duty of Traveler.

4. Where a sufficient portion of a highway is made suitable for travel, the invitation to the public to use it is confined to the prepared or used portion; and for injuries received outside thereof a traveler cannot recover unless he can excuse his presence at the place where he was injured.

Same—Telephone Poles—Construction on Highways.

5. A telephone company is not a trespasser on a highway nor negligent *per se* in maintaining a guy wire on a portion of it not intended for travel, section 4400, Revised Codes, giving to such company the right to construct its lines along the highways, provided the traveling public is not endangered or inconvenienced thereby.

Same—Insufficiency of Evidence—Nonsuit.

6. Under the rule that where the pleadings or proof show that plaintiff's own act brought about the personal injury complained of, recovery cannot be had in the absence of explanatory allegation or evidence excusing it, *held* that a nonsuit was improperly denied where plaintiff's own testimony, while showing that when driving a horse, under complete control, one wheel of her buggy struck a guy wire placed by defendant telephone company outside the traveled portion of the highway, causing a runaway, was silent as to why she was traveling outside the traveled portion of the road at the time of the accident, whether or not she knew of the location of the wire, *etc.*

Same—Instructions—Inapplicability to Facts—Proper Refusal.

7. The evidence having indisputably shown that plaintiff's horse was under perfect control, a requested instruction looking to the submission of the question whether the animal was unmanageable at the time of the accident was properly refused because inapplicable to the facts of the case.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by Ruth E. Howard against the Flathead Independent Telephone Company and the Montana Independent Telephone Company. From a judgment in favor of plaintiff and an order denying the former company a new trial, it appeals. Reversed and remanded.

Mr. Elmer E. Hershey and *Mr. William Wayne,* for Appellant, submitted a brief and argued the cause orally.

Messrs. O'Hara, Edwards & Madeen, for Respondent, submitted a brief; *Mr. Thos. J. Edwards* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint herein charges that the defendant Flathead Independent Telephone Company, during December, 1911, maintained a telephone line along the public highway two miles west of Victor, Montana, that at a point on that highway near the foot of Blackmore Hill it had attached a guy or stay wire to one of its telephone posts standing at the side of the road, which guy wire extended for several feet toward the center of the road, and to the ground where it was anchored, "obstructing said road, and making traveling thereon dangerous to the public"; that on December 9, 1911, while plaintiff was riding along the road in a buggy drawn by one horse, a wheel of her buggy ran into said guy wire, with the result that her horse became frightened, ran away, caused the buggy to be overturned, and plaintiff thrown out and injured. The answer of the Flathead Independent Telephone Company consists of a general denial of the allegations charging negligence, and an affirmative plea that the plaintiff's injuries were caused solely by her own negligence. Upon the affirmative matter, issues were made by reply. At the conclusion of plaintiff's case the action was dismissed as to the Montana Independent Telephone Company. From a judgment in favor of plaintiff, and from an order denying the Flathead Independent Telephone Company a new trial, these appeals are prosecuted.

Upon the trial evidence was offered on behalf of plaintiff, to the effect that at the place of the alleged injury a public road from the southwest known as the Blackmore Hill road unites with a road from the south known as the Davis road, and the road formed by the union of these two runs north to John Blake's residence, where it turns to the east and extends to the town of Victor; that the entire width of these roads is not graded for use, and not fit for use; that the graded portion of the Blackmore Hill road is about twelve feet wide, and at the point of union of the two roads the graded or traveled portion is from sixteen to thirty feet wide; that at the time of the acci-

dent this graded portion was in good condition for traveling; that on the south side of the graded portion was a considerable bank, and on the north side stones had been thrown; that the line of telephone poles is about one foot within the western or northern line of the extreme limits of the highway, and eight or nine feet from the nearest line of the graded or traveled portion of the road; that the guy wire in question was at about the point where the two roads unite, and was anchored to the ground at a point from one foot to three feet outside the graded or traveled portion of the road; that on the afternoon of December 9, 1911, plaintiff came down the Blackmore Hill road from the southwest, on her way to Victor; that the horse drawing her buggy was gentle; that the plaintiff had been over this road many times before and knew of the telephone line; that just at the point of juncture of the two roads—to quote her own testimony: "My buggy came in contact with the wire, and my horse reared and jumped to one side, and something broke, I don't know what it was, and she continued to run until we came to the Blake corner, and she went around the corner very fast, and the buggy was thrown over, and I was thrown out. It was nearly 6 o'clock and dark. I didn't see the wire before I ran into it; but I had the horse under control. * * * I reached the foot of Blackmore Hill about a quarter of 6, I should think, and it was nearly dark. I could see my horse all right. I had driven down this hill before in the dusk. * * * My wheel struck the wire and run over it. My horse was on a jog trot. I should think I hit the wire about two and a half feet from the ground. The wheel of my buggy did not run under the wire; but I bumped against it. I had my horse under perfect control. It was still quiet, and I cannot give any explanation as to why I hit that wire. The horse did not shy or rear up."

The foregoing, with evidence indicating the extent of her injuries, fairly epitomizes plaintiff's case. The defendant Flathead Independent Telephone Company interposed a motion for a nonsuit; but this was denied, and the ruling of the court thereon is made the principal ground of appellant's contention in this court.

Whether the evidence above makes out a *prima facie* case of actionable negligence depends upon a number of well-settled principles of law. Plaintiff's case was presented apparently upon the theory that proof of negligence on the part of the defendant and resulting injury to the plaintiff makes out a *prima facie* case, for her counsel in their brief say: "Did the Flathead Independent Telephone Company so construct its lines 'as not to incommode or endanger the public in the use of said roads'? If it did not, and one of the public was injured, then, in the absence of excusing circumstances, sufficient under the law, defendant is liable for such injury." That is not the law [1] in this state or elsewhere, so far as we know. It is the rule, established by repeated decisions of this court, and generally recognized by the authorities, that, in addition to proof of negligence and resulting injury, plaintiff must bear the burden of showing that the particular negligence charged was a proximate cause of the injury. (*Therriault* v. *England*, 43 Mont. 376, 116 Pac. 581; *Monson* v. *La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.) While theoretically a public highway in this state is sixty feet in width (sec. 1339, Rev. Codes), it is the rule recognized generally that the [2] county is not required to grade or keep the highway for its entire width in condition for public travel; but its duty is fully discharged in this respect if the portion graded or made ready for travel is of sufficient width to accommodate the use which may fairly be anticipated to be made of it, and the authorities in control may use the remaining portions for purposes inconsistent with their use as driveways, as, for instance, for piling stones, cutting down and leaving steep embankments, or for drainage ditches. (Elliott on Roads and Streets, secs. 588, 800; *Nelson* v. *City of Spokane*, 45 Wash. 31, 122 Am. St. Rep. 881, 13 Ann. Cas. 280, 8 L. R. A. (n. s.) 636, 87 Pac 1048; *Blankenship* v. *King County*, 68 Wash. 84, 40 L. R. A. (n. s.) 182, 122 Pac. 616; *Monongahela City* v. *Fischer*, 111 Pa. 9, 56 Am. Rep. 241, 2 Atl. 87; *Hammacher* v. *New Berlin*, 124 Wis. 249, 102 N. W. 489; *Kelley* v. *Fond du Lac*, 31 Wis. 179; Thompson's Commentaries on the Law of Negligence, secs. 6008, 6009.)

[3] Whether the portion graded or otherwise made suitable for travel is of sufficient width to accommodate the public is a ques-
[4] tion of fact. When a sufficient portion of the public highway is graded or otherwise prepared for travel, the invitation to the public to use the highway is confined to the prepared or used portion, and the duty then devolves upon the traveler to keep within that portion prepared for his use to which his invitation extends, and for injuries received outside of that portion he cannot recover, unless he can excuse his presence at the place where he was injured. (2 Thompson on Negligence, p. 769; *Kelley* v. *Fond du Lac*, above; *Herndon* v. *Salt Lake City*, 34 Utah, 65, 131 Am. St. Rep. 827, 95 Pac. 646; *Davidson* v. *Utah Independent Telephone Co.*, 34 Utah, 249, 97 Pac. 125.)

This appellant was not a trespasser upon the highway nor negligent *per se* in maintaining the guy wire upon that portion
[5] of the public highway not intended for travel. Section 4400, Revised Codes, gives to a telephone company the right to construct its lines along the public highways of the state, and to erect on such highways, posts, piers and other necessary structures, with this restriction, that the public shall not be endangered or inconvenienced in the use of the highways thereby. In the present instance the utmost that can be said of appellant's act in attaching its guy wire so near the traveled roadway is that it was a question for the jury whether it constituted negligence.

At the time the plaintiff came in contact with the guy wire she was driving outside the graded or traveled portion of the highway. Her horse was under control, so that she must have
[6] directed its course or permitted it to wander at will. If, in her complaint, plaintiff had alleged that she directed her horse out of the roadway or permitted it to carry her without the traveled or prepared portion, and thereby brought her buggy into contact with the guy wire and caused the runaway which resulted in her injury, her complaint would fail to state a cause of action, without some explanatory allegation excusing her conduct, upon the theory that her own negligence contributed to her injury. This was the rule announced in *Kennon* v.

Gilmer, 4 Mont. 435, 2 Pac. 21, and is repeated in numerous decisions since that time (*Ball* v. *Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Birsch* v. *Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940; *Schroder* v. *Montana Iron Works*, 38 Mont. 474, 100 Pac. 619; *Badovinac* v. *Northern Pac. Ry. Co.*, 39 Mont. 454, 104 Pac. 543; *Lynes* v. *Northern Pac. Ry. Co.*, 43 Mont. 317, Ann. Cas. 1912C, 183, 117 Pac. 81; *Conway* v. *Monidah Trust*, 47 Mont. 269, 132 Pac. 26), and this rule is equally as applicable to the proof as to the pleadings; and since the facts which, if they had appeared in her complaint, would have defeated plaintiff's right to recover were made to appear from her own evidence, without any explanation, they defeated her right to recover and entitled the appellant to a nonsuit (*Ball* v. *Gussenhoven*, above; *Nelson* v. *Boston & Mont. C. C. & S. M. Co.*, 35 Mont. 223, 88 Pac. 785; *Longpre* v. *Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131). Plaintiff was not asked to explain her conduct at the time she came in contact with the guy wire. She testified that she did not see the wire until she reached it; but she did not explain whether she was looking ahead or behind at the time, whether she could have seen the wire if she had been directing her attention to driving, whether she knew of the location of the wire with reference to the traveled portion of the road, or whether she could see the road. The language employed in *Lynes* v. *Northern Pac. Ry. Co.*, above, is peculiarly pertinent here.. It was simply impossible for the jury to know whether it was the defendant's negligence in placing the anchorage of the guy wire so near the traveled portion of the roadway —assuming that the defendant was guilty of negligence—or whether it was plaintiff's own act in leaving the roadway which was the proximate cause of her injury. Had she kept to the used portion, she could not have come in contact with the wire, and the fact that she was outside that portion of the highway intended for public travel—at a point where it could not be anticipated a traveler would be—called for some explanation on her part, and in her failure to give it she failed to make out a *prima facie* case of actionable negligence on the part of this appellant.

Instruction No. 9, given by the court, is not expressed in very apt terms; but it is not open to the criticism directed against it.

Instruction No. 9, requested by this appellant and refused, was not applicable to the facts of this case. It sought to submit for [7] determination the question whether plaintiff's horse was unmanageable at the time the buggy came in contact with the wire, while the undisputed evidence is that at that time the horse was under perfect control.

Our observations upon the ruling of the court denying the motion for a nonsuit dispose of the other questions raised upon these appeals.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

MEREDITH ET AL., RESPONDENTS, *v.* ROMAN ET AL., APPELLANTS.

(No. 3,382.)

(Submitted May 4, 1914. Decided May 16, 1914.)

[141 Pac. 643.]

Contracts—Breach—Construction—Plans and Specifications—Pleadings—Amendments—Trial—Continuance—Complaint—Misjoinder of Parties and Causes of Action—Practice—Subcontracts—Evidence—Account-books—Counterclaim.

Pleadings—Amendments—Leave of Court.

1. After a cause is at issue and has been set for trial, defendant may not file an amended answer as a matter of right under section 6588, Revised Codes, but must obtain permission of the trial court to do so, pursuant to the provisions of section 6589.

[As to amendment to pleading on trial, see note in 5 Ann. Cas. 674. As to amendment to pleading as requiring new process, see note in Ann. Cas. 1913B, 831.]

Same.

2. Section 6579, Revised Codes, which confers upon district courts the power to adjust the rights of codefendants *inter sese*, does not permit the adjustment of such rights in a case in which their claims are wholly independent of, and not in any way connected with, those of plaintiff, nor give the defendants the right to file new or amended pleadings irrespective of the requirements of section 6589.

Same—Excusable Delay—Effect.

3. Delay in filing an amended answer, occasioned by negotiations looking to a settlement of a controversy, did not authorize its filing without permission of court after the expiration of the time within which an amended pleading may be filed as a matter of right.

Same—Striking Amended Pleading.

4. Where the trial court could properly have stricken an amended pleading as a whole because filed without leave of court, it did not commit error in striking portions of it.

Continuance—When to be Granted.

5. A continuance ought to be granted whenever the facts shown upon the application therefor would authorize the court, under section 6589, Revised Codes, to relieve a party from a judgment, order or other proceeding taken against him through his mistake, surprise or excusable neglect.

[As to absence of counsel as ground for continuance, see note in Ann. Cas. 1913C, 431.]

Same—Stipulation—What Does not Constitute.

6. Correspondence between opposing counsel examined and *held* not to have constituted a stipulation for the postponement of a trial, so as to have been binding upon respondent.

[As to validity and enforcement of oral stipulations, see note in Ann. Cas. 1913B, 153.]

Same—Denial—Harmless Error.

7. Denial of an application of a continuance on account of the absence of witnesses, if error, *held* harmless, where opposing counsel admitted that, if present, they would testify to the facts which the applicant stated in his affidavit for the postponement he expected to prove by them, and where it further appeared that they had no personal knowledge of the transaction at issue.

Misjoinder of Parties and Causes of Action—Objection—Practice.

8. The point that the complaint discloses a misjoinder of parties or that causes of action are improperly united may not be raised by objection to the introduction of evidence, but must be taken advantage of by special demurrer, else the right to object is waived.

Contracts—Character of Work—Evidence—Harmless Error.

9. Where the answer, in an action by a subcontractor to recover a balance due him, admitted that plaintiff had done the work in conformity with the plans and specifications furnished him, testimony of plaintiff that defendant's civil engineer had stated that the work was being done to his satisfaction, though not relevant to the issues, was nonprejudicial.

Same—Plans and Specifications—Subcontracts.

10. A stipulation, in a subcontract for the construction of a ditch, that the work was to be done in accordance with the plans and specifications in the original contract, does not have the effect of incorporating into the subcontract a provision contained in the original one empowering the owner to assume charge of the work if it should be

abandoned or unnecessarily delayed, so as to authorize the original contractor to do likewise.

Evidence—Books of Account—When Inadmissible.

11. Account-books *held* inadmissible where the person who had kept them was not called to identify them, and where no preliminary proof had been introduced to show that they had been correctly kept in the usual course of business, or that the entries were contemporaneous with the transactions to which they related.

Counterclaim—Must be Pleaded.

12. Where defendants had a counterclaim for supplies, *etc.*, furnished to plaintiffs, but failed to plead it, evidence touching the same was properly excluded.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by George Meredith and another against the Bitter Root Valley Irrigation Company, Nels Roman, and others. Judgment for the plaintiffs and defendants Roman and Bennett appeal from it and an order denying their motion for a new trial. Affirmed.

Messrs. Galen & Mettler, for Appellants, submitted a brief; *Mr. Albert J. Galen* argued the cause orally.

Mr. Chas. N. Madeen, for Respondents, submitted a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant Bitter Root Valley Irrigation Company, a corporation, hereafter referred to as "the company," at the time of the occurrences out of which this controversy arose, was the owner of a storage reservoir at Lake Como, in Ravalli county, together with the right of way for a canal and a canal in course of construction thereon, extending from the reservoir northward through Bitter Root Valley. The purpose for which the canal was being constructed was to convey water to the lands lying along its course belonging to the company, to irrigate them. On October 18, 1909, it entered into a contract with defendant Thomas J. White, under the terms of which the latter agreed to do all the work necessary to complete a portion

of the canal described in specifications and plans attached to the contract. The work was to be done in compliance with the specifications and plans, to the entire satisfaction of the company. The compensation to be paid was fixed at a stipulated price per cubic yard for excavation work, varying in amount according to the nature of material to be moved, per square yard for grubbing, and per acre for plowing, *etc.* All the work was to be completed on or before May 1, 1910. Among other things it was stipulated: "If the work to be done under this contract shall be abandoned, or if at any time the company shall be of the opinion that the said work is unnecessarily delayed * * * or * * * the contractor fails to show such progress in the execution of the work as will give reasonable grounds for anticipating the completion within the required time, the said company shall have the power to notify the contractor to discontinue all work or any part thereof under this contract * * * and the said company shall thereupon have the right, at its discretion, to contract with other parties for the delivery or completion of all or any part of the work left uncompleted by said contractor, or for the correction of the whole or any part of said work. In case the expense incurred by said company is less than would have been payable under this contract if the same had been completed by said contractor, then said contractor shall be entitled to receive the difference." On November 1, by contract with defendants Roman and Bennett, copartners, White sublet to them a portion of the work, including all that part of the canal between stations 2893 and 3083. On November 6 these defendants sublet to the plaintiffs that part of the work included between stations 2893 and 2999. The stations marked the sections of uniform length into which the whole line of canal was divided. In both of these latter contracts it was stipulated that the work covered by them should be completed on or before May 1, 1910, in conformity with the "specifications and plans" embodied in the contract of the company with White, to the entire satisfaction of the engineers of the defendant company. As the basis of compensation, the classification of ma-

terial moved was to be made by the engineers of the company. Neither of them contained any other reference to the White contract.

The complaint contains two causes of action and seeks recovery against all the defendants. In the first cause of action, after a recital of the facts above stated, it is alleged, that immediately after entering into the contract, the plaintiffs began the work which they had agreed to perform thereunder, and continued the same until its completion, except when delayed by the defendants; that, in consideration of the completion thereof and the fulfillment of all the terms and conditions of the contract by plaintiffs, the defendants became indebted to them in the sum of $1,678.85; and that no part of this amount has been paid except the sum of $801.35, leaving a balance due of $876.50. Then follow allegations to the effect that, within the time prescribed by the statute and in conformity with its requirements, plaintiffs filed with the clerk of Ravalli county their notice of claim of lien upon the reservoir, canal, right of way, *etc.*, of the company. The prayer demands that plaintiffs have judgment for the balance due, with costs; that the same be declared a lien upon the property of the company; and that the property be sold to satisfy the judgment in case the same shall not be satisfied by Roman and Bennett. At the trial the issues presented in connection with the second cause of action were resolved in favor of the defendants. It is therefore not necessary to state the nature of it or its purpose further than to say that it demanded damages for delay caused plaintiffs by interference by defendants with the prosecution of the work covered by the contract.

The action was commenced on October 5, 1910. The issues having been made up by answers by the defendants, the trial was set for October ——, 1911. Upon stipulation by counsel the setting was vacated. Thereafter the date of the trial was fixed for March 18, 1912. After the order fixing the date of trial, and on February 23, the defendants Roman and Bennett, without leave of court, filed and served upon counsel for plaintiffs a pleading which purports to be an amended answer, "cross-

complaint and counterclaim," for affirmative relief. In the portion of this pleading designated as an answer, it is alleged that these defendants are entitled to a credit of $1,582.15 upon the amount earned by the plaintiffs under their contract, instead of $801.50, as alleged in the complaint, leaving a balance due plaintiffs of $94.70. It is further alleged that the plaintiffs have fully and in all particulars performed all the terms, provisions and obligations of said contract on their part to be kept and performed, "save and except that it became necessary for these defendants to furnish to the said plaintiffs the use of their construction force at an agreed charge therefor of $780.80, which said sum is included in the above-named credit of $1,582.15." The portion of the answer designated cross-complaint and counterclaim contains allegations appropriate to charge the defendant company and White for a balance due Roman and Bennett for work done under their contract of $9,767.71, and judgment is demanded against them for this amount. It is alleged that the work done by the plaintiffs, for which they seek to charge the defendants Roman and Bennett, was done under the several contracts heretofore referred to, and is a joint liability against these defendants and the company and White. It is further alleged that in order to determine justly and equitably the rights of the plaintiffs against Roman and Bennett, and in order to avoid circuity of action and a multiplicity of suits, it is essential that the rights of these defendants as against the company and White be finally determined and fully adjudicated in this action. On March 5, 1912, on motion of plaintiffs, the portion of the so-called cross-complaint and counterclaim, seeking to charge the company and White for the balance alleged to be due Roman and Bennett, were stricken out on the ground that these allegations were redundant and did not constitute a defense or counterclaim to either cause of action set forth in the complaint. Thereupon the plaintiffs filed a reply denying the allegations of the answer wherein Roman and Bennett claim an additional credit of $780.80 for furnishing to plaintiffs their construction force. On February 24, by leave of court the company filed an amended

answer putting in issue all the allegations in the complaint charging liability against it in favor of plaintiffs. On March 12, four days after the disposition of plaintiffs' motion, the company also filed its answer to the counterclaim and cross-complaint, including those portions which had been stricken out on plaintiffs' motion, tendering issue upon all the allegations charging liability to Roman and Bennett jointly with White, for the work done by them under their contract with the latter. It is alleged that on July 16, 1910, Roman and Bennett filed with the clerk of Ravalli county their notice of claim of lien for the balance due them from White, but that, by failing for more than one year to bring an action in the proper court to enforce their claim, they had waived their rights in the premises. It is admitted that a small balance is due from the company to White; but it is averred that the company is entitled to retain this amount pending the determination of an action brought by one Michael Tobin, and now pending, to establish against the property of the company a lien for work done by him under the contract between the company and White. There is a general denial of all the other allegations. The plaintiffs by reply deny all the affirmative allegations of this answer relating to their claim. What pleadings, if any, were filed by White, the record, which does not contain the entire judgment-roll, does not disclose, though he was represented by counsel at the trial. An application for a postponement of the trial on behalf of Roman and Bennett having been denied, counsel for plaintiffs dismissed the second cause of action as against the company and White. He announced also that "no personal judgment" was sought against either of them on the first cause of action, but that it would be prosecuted as against them solely for the purpose of establishing plaintiffs' claim to the lien. The plaintiff was awarded a verdict for the full amount of the balance alleged to be due, and judgment was entered declaring it a lien upon the property of the company, with the usual provisions for a foreclosure sale in case Roman and Bennett should not be able to satisfy it. No disposition seems to have been made of the issues joined be-

tween the defendants upon the allegations of the cross-complaint. The defendants Roman and Bennett have appealed from the judgment and an order denying their motion for a new trial.

1. The first contention made is that the court erred in striking out the portions of the cross-complaint and counterclaim referred to above. It is argued that the defendants had the [1] right to file the amended pleading, under section 6588 of the Revised Codes. This section has reference to amendments which may be made as of right, and not to those which may be made only by permission of the court. (*Holter Hardware Co.* v. *Ontario Min. Co.*, 24 Mont. 184, 61 Pac. 3.) By the express words of the section, such an amendment is permissible, as of right only "at any time before answer or demurrer filed, or twenty days after demurrer and before the trial of the issue of law thereon." After the issue of law is tried and determined and the issues of fact are made up, the amendment must be made by permission under section 6589, upon such terms as the court, under all the circumstances and in the exercise of a sound discretion, may deem proper. The sole issue presented by the pleadings at the time the so-called cross-complaint and counterclaim was filed was as to the amount due plaintiffs for the work done under their contract. Conceding, as counsel contend, that, under section 6579 of the Revised [2] Codes, the court ought in proper cases to determine the rights of the defendants *inter sese* when the proper demand is made in his answer by the defendant desiring such relief, this requirement does not in any way affect the rules relating to amendments, or give the parties the right to file new pleadings at pleasure, and thus change the issues after they are once made up and the cause is ready for trial. As we take it, this provision is nothing more than a declaration, in statutory form, of the familiar rule that a court of equity, when all the parties to a controversy are before it, will adjust the rights of all and leave nothing open for future litigation, if it can be helped. (16 Cyc. 107, 108.) We do not think it requires or permits the adjustment of the rights of defendants *inter sese* in any case

in which, as here, they are wholly independent of, and not in any way connected with, the rights of the plaintiff. Otherwise, in any case defendants, against whom a plaintiff seeks relief and who have controversies with each other of any character, may interplead and have them adjusted. Such a construction of it would tend to delay, rather than to facilitate, the administration of justice, and might operate as a serious and substantial detriment to plaintiff's rights. In any event, however broad may be its application, a party cannot complain that he has been prejudiced by a nonobservance of it by the court, when he has failed to invoke it at the proper time and in the proper way.

The case is not mended by the fact that, in resistance to the [3] motion, counsel for Roman and Bennett filed an affidavit alleging, as an excuse for not filing the amended pleading earlier, that negotiations had been pending between his clients and the company and White for a settlement. Delay, though entirely excusable, did not justify a change of the issues without permission of court. Inasmuch as the whole pleading [4] might properly have been stricken (*Weir* v. *Washoe H. & S. Co.*, 31 Nev. 528, 104 Pac. 19; *Worley* v. *Spreckels Bros. Com. Co.*, 163 Cal. 60, 124 Pac. 697), the court did not err in striking out the portions of it it did. Moreover, the issues upon the cross-complaint and counterclaim were apparently fully made up by the subsequent pleadings on the part of White and the company. So far as the record discloses, the way was thus left open to Roman and Bennett to litigate their claims with their codefendants. They do not appear to have offered to do so, for they tendered no evidence. The record discloses no ruling of the court with reference to their rights in the premises. For this reason, also, we do not think the court may be convicted of error.

2. It is earnestly contended that the court abused its dis- [5] cretion, to the prejudice of defendants, in denying the application for a postponement of the trial. The grounds upon which the application was based, as disclosed by the affidavits

of counsel, were that a stipulation for a postponement had been made between them and counsel for plaintiffs a few days before the time fixed for the trial, the result of which was that neither the defendants nor their counsel, after discovering that the cause would be tried, could conveniently be present; that the defendant Bennett could not be present because of illness in his family; that defendant Roman resided so far away from the place of trial that he could not be notified in time to be present; and that both members of the firm of attorneys who represented these defendants, relying upon the stipulation, had arranged to go elsewhere, and therefore neither of them could be present. Counsel for plaintiffs presented counter-affidavits denying that any stipulation had been made. The statute (section 6729) authorizes the granting of a postponement on the ground of absence of material evidence which it is expected will be obtained, when it appears that the moving party has been diligent in his effort to obtain it. The court may require the moving party to set forth in his affidavit the evidence which he expects to obtain. If the adverse party then admits that such evidence would be given, and that it be considered as actually given or offered, subject to legal objection, the postponement must be denied. A postponement may be granted on other grounds than the absence of evidence. It is manifestly the intention of this provision to protect the court from imposition and to prevent unnecessary delay. It is also its purpose to secure litigants the opportunity to try their controversies on the merits. No general rule can be laid down which will include all the circumstances under which a postponement should be granted. It may safely be said, however, that whenever the facts shown upon the application would authorize the court, under section 6589, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, surprise, or excusable neglect, the postponement ought to be granted. (*Light* v. *Richardson*, 3 Cal. Unrep. 745, 31 Pac. 1123.)

On March 3, fifteen days after the date set for the trial, [6] Mr. Madeen, counsel for plaintiffs, who resides at Mis-

soula, wrote to Mr. Galen, one of counsel for Roman and Bennett, residing at Helena, that the plaintiff Meredith was suffering from a broken leg and would probably not be able to attend the trial, and that it might, on that account, be necessary for him to apply for a postponement. He inquired whether he could obtain a stipulation for a postponement in case Meredith could not be present, or must apply to the court upon a proper showing. The reply by Mr. Galen on March 7 was that the matter would be taken up with his clients to ascertain whether they would consent, and the result reported. This letter contained a request that Mr. Madeen would ascertain definitely, as soon as possible, whether Meredith could be present and inform Mr. Galen whether he would desire a postponement. On March 10 Mr. Madeen wrote that he would let Mr. Galen know his wishes as soon as he could hear from Meredith. On March 11 he again wrote, saying that he had not heard from Mr. Meredith, but would telegraph as soon as he gained information of him. On March 12 Mr. Galen wrote: "We will stipulate for continuance as requested." On March 13 Mr. Madeen, having heard from Meredith that he could be present, telegraphed Mr. Galen: "We will try Roman and Bennett case as set eighteenth." At that time Mr. Madeen had not any information from Mr. Galen that his clients would consent to a postponement or that they expected to apply for one, though in his letter written on March 12, which had not yet reached Mr. Madeen, Mr. Galen stated that inasmuch as Mr. Bennett had sickness in his family, and Mr. Roman could not be reached without great difficulty, there should be a postponement. It is apparent from this correspondence that no definite agreement was reached at any time upon which Mr. Galen was entitled to rely. Mr. Madeen's inquiry as to whether the matter could be arranged by stipulation, at best, went no further than to imply that he would ask for a stipulation in case he ascertained that Meredith could not be present and it would be agreeable to Mr. Galen. The fact that Mr. Galen later concluded that it was necessary for him to have a postponement did not justify his treatment of Mr. Madeen's inquiry as a

definite offer to stipulate and to accept it as such, so as to bind Mr. Madeen.

Let it be assumed, however, that Mr. Galen was misled into the belief that there would be a postponement until it was too late for him to communicate with Mr. Roman. It is disclosed [7] by the record that Mr. Galen and Mr. Bennett were both present throughout the trial, and that Mr. Bennett was called and testified. Furthermore, the affidavit for the postponement, which was made by Mr. Galen, set out fully the facts which he expected to prove by both of his clients. Mr. Madeen thereupon admitted that if they were present they would testify to them. The affidavit contained no showing of diligent effort to secure Roman's presence. This was indispensably necessary. (Rev. Codes, sec. 6729.) Finally, it conclusively appears from the testimony of Mr. Bennett that the work covered by his and Roman's contract with White was prosecuted and completed through the agency of two of their employees, Emerson and Bradley, while both defendants were in Wyoming engaged in other work, and that neither of them had any personal knowledge of the books of account or anything that transpired in connection with plaintiffs' contract or the work covered by it. Therefore, if it be conceded that defendants were *prima facie* entitled to a postponement upon the showing made, it is apparent that in the final event they suffered no prejudice. Hence they cannot now complain.

3 It is argued, that when plaintiffs dismissed the second cause of action as to the company and White, the complaint disclosed [8] upon its face a misjoinder of parties defendant and different causes of action improperly united, and that the court erred in overruling defendants' objection to the introduction of evidence. This contention is without merit. The defects in the complaint made apparent by the action of plaintiffs' counsel, if such they were, could not be made of avail to the defendants by general objection to the introduction of evidence. That there is a misjoinder of parties or that causes of action are improperly united are grounds of special demurrer. (Rev. Codes, sec. 6534.) Objection to a complaint

on either or both grounds must be taken by demurrer, or the right to object is waived. (Rev. Codes, sec. 6539; *Knatz* v. *Wise*, 16 Mont. 555, 41 Pac. 710; *Haupt* v. *Independent Tel. M. Co.*, 25 Mont. 122, 63 Pac. 1033; *Logan* v. *Billings & Northern R. Co.*, 40 Mont. 467, 107 Pac. 415.) As pointed out in the case last cited, *supra*, after the issues have been joined, the plaintiff is entitled to all the relief which the complaint authorizes the court to grant against any defendant upon whom the evidence fixes liability. If the defendants desired to object to the pleadings on the grounds now urged, they should have asked leave to withdraw their answer and to file a special demurrer.

4. During the prosecution of the work by the plaintiffs, one [9] A. E. Walsh was acting as engineer for the company. It was his duty to see that the work was done in conformity with the specifications and plans furnished by the company. During the course of his examination, the plaintiff Meredith stated that Mr. Walsh was present when the work was completed. He was then asked what Mr. Walsh said as to the character of the work. Counsel for defendants objected that any statement by Walsh was incompetent, because it did not appear that he was the agent of the defendants and authorized to speak for them. The objection was overruled, and the witness answered: "He said the work was being done to his satisfaction. He said it was a good piece of work that was done on the ditch." It is argued that this was error. The admission in the answer of defendants that plaintiffs had complied with all the terms and conditions of the contract, except that they had not given to defendants credit for the amount they were entitled to, included the admission that the work had been done in compliance with the specifications and plans. This being so, the evidence was not relevant to any issue in the case. Nevertheless its admission could not have wrought prejudice. (*Emerson* v. *Bigler*, 21 Mont. 200, 53 Pac. 621.) Furthermore, under the terms of plaintiffs' contract, the work was to be done to the satisfaction of the engineers of the company; therefore the objection was not well made.

5. The evidence introduced by the plaintiffs disclosed that during the month of April, 1910, Bradley having about com-
[10] pleted the portion of the work not sublet to the plaintiffs and being anxious to move the crew in his charge to the state of Wyoming, where the defendants were engaged in work under a contract with other parties, over objection and protest by the plaintiffs, with a force of men and teams took charge of and completed the unfinished portion of plaintiffs' work. It was also disclosed, without substantial dispute, that the plaintiffs were provided with a sufficient force of their own to complete their work within the time fixed by the contract. The defendants did this upon the assumption that all the provisions of the White contract, quoted in the statement, were embodied in the two subcontracts, and that by virtue of them they had the authority, at any time they deemed it necessary, to assume charge of the unfinished portion of the work awarded to any subcontractor, and to complete it and charge the subcontractor with the expense incurred. The ground of this assumption is the stipulation in each of the subcontracts that the work was to be done in compliance with the specifications and plans attached to the White contract, and to the entire satisfaction of the engineers of the company. Proceeding upon this assumption, counsel for defendants offered to introduce the White contract and that of defendants, to justify their conduct in interfering with plaintiffs' contract, and evidence touching the amount expended by them in completing the work, in order to show that they were entitled to the additional credit claimed in their answer. The evidence was all excluded. The contention is made that this was error. We do not agree with counsel that the stipulation in the subcontracts embodied in them any of the terms and conditions found in the White contract, because they refer only to the specifications and plans attached to it and not to the contract itself. (*Young* v. *Borzone,* 26 Wash. 4, 66 Pac. 135, 421; *Moreing* v. *Weber,* 3 Cal. App. 14, 84 Pac. 220; *Cruthers* v. *Donahue,* 85 Conn. 629, Ann. Cas. 1913C, 221, 84 Atl. 323; *Beattie* v. *McMullen,* 80 Conn. 160, 67 Atl. 488.) Let it be assumed, however, that the contention

of counsel is correct. When we come to examine the White contract to find a provision justifying the conduct of defendants, we do not find any. The provision quoted in the statement, upon which the defendants rely exclusively, conferred authority to interfere expressly upon the company, and not upon the defendants. Furthermore, the right to interfere and assume control at any time was not absolute, but was made dependent upon the existence of certain conditions named; that is to say: "If the work * * * shall be abandoned; or if * * * the company shall be of opinion that said work is unnecessarily delayed; or the contractor * * * fails to show such progress * * * as will give reasonable grounds for anticipating the completion within the required time." The company was made the judge as to the existence of the facts justifying its interference, but even it could not have interfered as did the defendants, and ignored the rights of the plaintiffs simply because it chose to do so. To justify such interference, it was indispensably necessary that the conditions existed which are referred to in the contract. This evidence was wholly irrelevant and was properly excluded.

The evidence offered to show the cost of the work done by defendants was also properly excluded, for two reasons: In the [11] first place, defendants relied exclusively upon their books of account showing the amounts expended for men and teams and their maintenance. It appeared that some time prior to the time the work was completed, and at that time, the books had been kept by Bradley. Bradley was not called to identify the books as those kept by him, nor was his absence from the trial accounted for. There was in fact no preliminary evidence tending to show that the books had been kept in the usual course of business, that the entries had been made contemporaneously with the transactions out of which the charges grew, or that they had been honestly and correctly kept. The defendant Bennett, in connection with whose testimony they were offered, testified in substance that he knew nothing of them, except that they had been delivered to him by Bradley after the work had been completed. This preliminary evidence

was necessary to render the books admissible. (*Ryan* v. *Dunphy*, 4 Mont. 356, 47 Am. Rep. 355, 5 Pac. 324; 3 Jones on Evidence, sec. 573; 1 Greenleaf on Evidence, 16th ed., 120.) In the second place, the answer admits that the plaintiffs did the [12] work according to the terms and conditions of the contract, except that defendants furnished to them their construction force at an agreed charge therefor of $780.80. Clearly, if this was true, the defendants had a counterclaim against the plaintiffs for this amount, as for supplies or for anything else furnished them on account, and should have formulated their pleadings accordingly.

Other contentions made are not of sufficient importance to require special notice.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

Rehearing denied June 8, 1914.

IN RE ALLARD GUARDIANSHIP.

(No. 3,380.)

(Submitted May 5, 1914. Decided May 22, 1914.)

[141 Pac. 661.]

Guardian and Ward—Loans of Ward's Funds—Interest—Duty of Guardian—Compensation—When Properly Disallowed—Attorney's Fees—Discretion.

Guardian and Ward—Settlement of Final Account—Loans—Interest.

1. Where a guardian of two minors admitted that a loan made by him originally belonged to the estate of one of them but that he transferred it, without order of court, to the account of the other, he was not in a position, on final settlement of the former's account, to complain of an order directing him to account to said minor for the interest

earned on such loan from the date of the transfer to the date upon which it was paid.

[As to powers of guardian in chancery and at common law, see notes in 18 Am. Dec. 689; 89 Am. St. Rep. 257.]

Same—Loaning Ward's Funds—Interest.

2. A guardian who without an order of court loaned the funds of his ward on an interest-bearing note, was properly directed to account for the interest due thereon at the date of final settlement even though the ward refused to accept the note (then due) in lieu of cash.

[As to personal liability of guardians, see note in 75 Am. Dec. 447.]

Same—Interest—Duty of Guardian.

3. A guardian must account for all accumulations from the use of his ward's funds, and will, under no circumstances, be permitted to profit from their use.

Same—Loaning Ward's Funds—Duty of Guardian.

4. *Quaere:* Must a guardian loan his ward's moneys, without directions from the court to do so?

Same—Liability of Guardian.

5. The rule that a guardian making a loan of his ward's funds must exercise due care is applied more strictly against a guardian who makes a loan on his own responsibility than where he makes one at the direction of the court.

Same—Compensation—When and When not to be Allowed.

6. Section 7777, Revised Codes, providing that every guardian must be allowed such compensation for his services as the court deems just, contemplates a faithful management of the estate by the guardian, and, while a mere technical breach of duty not resulting in injury to the ward will not ordinarily justify a court in withholding compensation altogether, a flagrant violation of the duties of the trust will do so.

Same—When Compensation not to be Allowed.

7. Where a guardian not only failed for more than thirteen years to render the annual account required by statute or make any inventory, but mingled guardianship funds with his own, giving checks for large amounts of his ward's money for purposes which he was unable to disclose, the court properly denied him compensation for his services.

Same—Misconduct Justifying Removal.

8. A guardian may not mingle guardianship funds with those belonging to himself, or profit by the use of the funds of the ward, and any such officer attempting so to do should be summarily removed.

Same—Attorney's Fees—Discretion.

9. The allowance of attorney's fees on final settlement of a guardian's account is in the court's discretion, and its action will not be disturbed in the absence of a clear abuse thereof.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

PROCEEDINGS by John M. Keith for the settlement of his account as guardian of Eva May Allard, minor. From an order correcting and allowing the account as corrected, and an order denying him a new trial, the guardian appeals. Affirmed.

Mr. Henry C. Stiff and *Mr. Thomas N. Marlowe,* for Appellant, submitted a brief; *Mr. Stiff* argued the cause orally.

Messrs. Tolan & Gaines, for Respondent, submitted a brief. *Mr. John H. Tolan* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 29, 1899, John M. Keith was duly appointed guardian of the persons and estates of Louise Anna Allard and Eva May Allard, minors, and immediately thereafter qualified. On December 16, 1912—Eva May Allard having become of age—the guardian presented his final account of his administration of her estate, and prayed that he be discharged as her guardian. In his account the guardian charged himself with total receipts amounting to $26,443.77, and took credit for expenditures made on behalf of the ward, aggregating $18,332.66. Of the balance, he represented that he had loaned $7,500 to Louise Stringer, and asked that he be permitted to turn over the note and be credited with the amount of the principal; that he be allowed, out of the $611.11 remaining, such compensation for himself as the court might fix, $150 for his attorney's fees; and that upon delivering the balance to the ward, together with the Stringer note duly indorsed, he be discharged. To this account, the ward interposed objections, and a hearing was ordered for December 28, but was continued to April 19, 1913, without being concluded. On April 19 the guardian filed an amended account in which he charged himself, as before, with receipts aggregating $26,443.77, but took credit for expenditures aggregating $20,656.52, including, as items of his expenditures, $1,048.88, compensation for himself as guardian, and $750 for his attorney's fees. In this amended account no mention whatever was made of the Stringer note or interest; but the amount of the principal was included in the total receipts, and a cash balance of $5,787.25 was admitted to be due to the ward. Written objections to this amended account having been made by the

ward, a hearing was had, which resulted in the court changing the account in four particulars. An order was made and entered charging the guardian with total receipts of $31,112.27, crediting him with expenditures on behalf of the ward, aggregating $19,107.66, allowing the account as thus corrected, and directing him to pay over to the ward a balance of $12,004.61. From that order and a further order denying the guardian a new trial, these appeals are prosecuted.

The difference between the amount admitted by the guardian to be due to the ward and the balance found to be due by the lower court is made up by charging the guardian with $923.50, interest on the William Irvine note, $3,745, interest on the Stringer note, disallowing his claim for compensation as guardian, and reducing his attorney's fees to $250. The four changes thus made in the amended account by the district court constitute the grounds of complaint presented by these appeals.

1. The first change made did not result in any prejudice to [1] the guardian, and therefore affords no ground for complaint so far as he is concerned. As guardian of the two Allard minors, he was an officer of the court, subject to its directions. (Rev. Codes, sec. 3788.) He admitted that the Irvine loan originally belonged to the Eva May Allard account; but he testified that he transferred it to the account of the other minor to equalize their loans. The transfer was made without an order of court, and he is now directed to account to the Eva May Allard estate for the interest earned on that loan from the date of the transfer to the day upon which the note was paid. The presumption is that the same court will give him credit for a like amount in the Louise Anna Allard account, and, if so, nothing whatever is involved but a mere matter of bookkeeping.

2. On May 10, 1902, the guardian, without an order of court, loaned $7,500 of the moneys belonging to this ward, taking a [2] demand note bearing interest at seven per cent and executed by Louise Stringer as principal and three others as accommodation indorsers. The interest was paid to November 10, 1905. At the time the final account was rendered in December,

1912, the principal was due, as was likewise accumulated interest amounting to $3,745. Because of the ward's refusal to accept that note, the guardian in his amended report treated it as $7,500 cash, charged himself with that amount as included in the total receipts, and made no mention of the note or the interest. The trial court, however, refused to permit this amendment, and in the order charged the guardian with the accrued interest as well.

If we understand the contention of appellant aright, it is that, if the ward so far ratified the loan as to insist upon having the accumulated interest, she should be held to accept the note as representing both the principal and the interest due, or, if she refuses to accept the note in lieu of cash, she should be held to repudiate the loan altogether, and therefore to be without any claim to the interest. Whatever merit there might be in an argument of this character when advanced by one of two persons, both *sui juris*, and dealing at arm's length, the relationship of guardian and ward is of such nature as to forbid the assertion of the doctrine for which the appellant contends. As guardian, it was his duty to "keep safely the property of his ward" (Rev. Codes, sec. 3786), and to "manage the estate of his ward frugally" (sec. 7771). Upon application of the ward or any other person interested, the district court might authorize or require the guardian to invest money belonging to his ward (sec. 7795), or, if the particular money was derived from the sale of other property of the ward for the express purpose of investment, then "the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court or judge." (Sec. 7783.) Beyond these specific directions, the Codes do not go, except to declare that: "The relation of a guardian and ward is confidential, and is subject to the provisions of the title on trusts." (Sec. 3787.)

Of the provisions of that same title on Trusts, section 5375 declares: "A trustee may not use or deal with the trust property for his own benefit, or for any other purpose unconnected

with the trust, in any manner." This court has emphasized that statutory rule by declaring that the trustee must account [3] for all accumulations from the use of trust funds, and that under no circumstances will he be permitted to profit from their use. (*In re Davis Estate*, 35 Mont. 273, 88 Pac. 957; *City of Butte* v. *Goodwin*, 47 Mont. 155, 134 Pac. 670.)

We are not called upon at this time to determine whether [4] it was an absolute duty devolving upon the appellant, as guardian, to loan his ward's moneys, without directions from the court to do so. The fact is he did make the Stringer loan on his own responsibility, and at the time he filed his final account it had earned $3,745 in interest, which he had not collected. Under the rules of the statute and the decisions of this court above, the guardian could not have any claim to the interest, but must account for the principal, as well as the accumulations.

Neither are we required to determine whether if, in making [5] the Stringer loan, the guardian exercised due care and caution, and the loan thereafter became worthless, without fault on his part, he should be credited with the amount in his final account, and the ward be compelled to accept the note in lieu of that much cash—that is not this case. It is sufficient at this time to say, however, that the rule is drawn much more strictly against the guardian where he makes loans upon his own responsibility than where he makes them at the direction of the court. (21 Cyc. 88.) Upon this hearing the guardian insisted that the Stringer loan is perfectly good and the note collectible; but he did not offer any satisfactory excuse for his failure to enforce collection before the time came for him to settle with his ward, so that he might have been in position to turn over the balance in cash, instead of tendering the note for the major portion of what he conceded to be due. In the face of his own testimony that the loan is good and the note collectible, and his failure to excuse himself, for not having reduced the debt to cash, it certainly cannot be said that the trial court abused its discretion in charging him with the then present value of prin-

cipal and interest. Neither is the position of the ward subject to criticism made by counsel for appellant. In effect she says to the guardian: "I did not require you to loan my funds, neither did I petition the court to direct you to do so; but, so long as you did loan them, I insist that you account for both principal and interest in cash."

3. Appellant complains of the action of the trial court in [6] denying him compensation for his services as guardian. It is urged upon us that the account as allowed and approved by the district court discloses that the estate of this ward was augmented by more than $6,000 in interest derived from loans negotiated by the guardian, and that for his services in the management of an estate of this magnitude, covering a period of nearly fourteen years, he should receive substantial remuneration. Section 7777, Revised Codes, provides: "Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court or judge in which his accounts are settled deems just and reasonable." But of course this statute contemplates a faithful stewardship. While a mere technical breach of duty which does not result in injury to the ward's estate will not ordinarily justify a court in withholding compensation altogether, a flagrant violation of the duties of the trust will do so. (*Scheib* v. *Thompson*, 23 Utah, 564, 65 Pac. 499; *In re Thompson's Estate*, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508; *Glassell* v. *Glassell*, 147 Cal. 510, 82 Pac. 42; 39 Cyc. 496.)

During the entire term of this guardianship the statute in force required every guardian to return to the court an [7] inventory of the estate of his ward within three months after his appointment, and annually thereafter (Code Civ. Proc., sec. 2985; Rev. Codes, sec. 7774), and, upon the expiration of a year from the time of his appointment, to render an account to the court (Code Civ. Proc., sec. 2986; Rev. Codes, sec. 7775). Not only did the guardian absolutely ignore these provisions of law, but the district court was equally remiss, for

no inventory was ever made, and from the date of appointment in March, 1899, to December, 1912—a period of more than thirteen years—no report was ever required by the court or rendered by the guardian. It is not any answer to say that the guardian managed the estate prudently and accounted for every cent belonging to it. The purpose of these statutory provisions is to furnish a means by which the guardian's management may be checked and his accounts verified. In the present instance the trial court was practically limited to the guardian's own testimony as to what property of this ward came into his possession, and what disposition he made of it, without any means of determining the truth of the testimony. These statutes were enacted to be obeyed, and the conduct of the guardian in ignoring them altogether is inexcusable, and all the more so because he had the advice and assistance of able counsel. In disallowing the guardian's claim for compensation, the trial court doubtless reached the conclusion that, by reason of his mismanagement of the estate, he had forfeited all claim to compensation.

The report filed by the guardian discloses that prior to May 20, 1902—the date of the first loans of any of these funds—he had received moneys belonging to this ward, aggregating more than $20,000, and he testified that during the same period he received an equal amount belonging to Anna Louise Allard. He was their joint guardian, and all the funds were supposed to have been deposited in his name as guardian with the First National Bank of Missoula. According to his account and his testimony, he should have deposited prior to May 29, 1902, more than $40,000; but his guardian account at the bank discloses that he had actually deposited only $30,524.97. What he did with the balance is not revealed by this record. According to his report and his testimony, he should have had on deposit in his guardianship account at the bank on May 20, 1902, more than $40,000; whereas, his bank account shows a balance in his favor on that day of only $596.12. His account in the bank, from the date of his appointment to the date of these first loans, reads as follows:

Date.	Checks.	Deposits.	Balance.
Mar. 30 (1899)		18,333.32	
Apr. 6	12,650.00		5,683.32
Aug. 30	5,000.00		683.32
Jan. 18 (1900)	Hayes	5,000.00	5,683.32
29	5,350.00		333.32
Feb. 1	30.25		303.07
13	178.00		125.07
May 26		6,666.66	6,791.73
31	6,500.00		291.13
May 22 (1901)	122.75		168.98
Oct. 14		146.66	315.64
Dec. 18	85.60		230.04
23		300.00	530.04
Feb. 27 (1902)		78.83	608.37
Mar. 7	13.25		595.12

When asked to explain these large withdrawals of $12,650, $5,000, $5,350, and $6,500, all within little more than a year from the date of his appointment, and to tell to whom the checks were given, and for what purposes, he was reduced to the miserable expedient of saying, "I cannot tell you; I do not know." The money was not loaned, and there was not any pretense that it was used for any purpose connected with the business of either ward. On that day he had expended for this ward but $125.32, according to his own report. We have, then, laid bare by the account of this guardian and his own testimony the fact that within little more than a year after his appointment he had withdrawn from his account as guardian of these minors $30,000 in round numbers, and yet he is unable to say for what purpose the money was used, and was unable to present any vouchers for it. The fact that this money was all accounted for in the final report does not even suggest a justification for such mismanagement. The guardian further testified:

"Q. Part of the time you carried this account in your own individual name at the First National Bank of Missoula? A. Part of it went into my individual account; there was no effort

made to keep a strict guardian's account, a bank account, none whatever.

"Q. When you carried this account of Eva and Anna, carried it in your own individual name, why you mingled it, of course, with your own fund? A. Yes, sir.

"Q. Do you know how long you carried this account of guardian in your own name, individually, in the bank? A. I could not tell. * * *

"Q. Why did you credit your own individual account with any funds belonging to Eva May Allard, a minor? A. Because it was immaterial where I carried it if I accounted for the funds.

"Q. Haven't you any reason to give the court at this time why you would make any transfer from your account as guardian? A. None whatever."

We refrain from further criticism of appellant, for it may be that the position assumed by this court in *In re Ricker's Estate*, 14 Mont. 153, 29 L. R. A. 622, 35 Pac. 960, served to lull him and his counsel into a sense of security, or misled them altogether as to the rule of conduct thereafter to be observed in this state in the management of trust funds. We repudiate the doctrine of that case as unwholesome from a moral standpoint, and as erroneous as a statement of the law. A guardian or [8] other trustee has no moral or legal right to mingle trust funds with his own private property, or to profit by the use of the funds belonging to the *cestui que trust*, and any trustee who attempts to do either should be summarily removed. (*Billings* v. *Billings*, 110 Mass. 225; *Gaston* v. *Hayden*, 98 Mo. App. 683, 73 S. W. 938; 1 Perry on Trusts, 6th ed., secs. 275, 447, 463.) In *Sparhawk* v. *Sparhawk*, 114 Mass. 356, the court said: "It is one of the primary duties of a trustee to keep the funds of the trust separate from his private funds, and not, by mingling them together, to expose the trust funds to the risks to which his own property may become liable." Section 5380, Revised Codes, declares that it is a fraud upon the beneficiary for the trustee to use the trust funds for any purpose not connected with the trust. While section 5375, above, was not in

force at the time the decision was rendered in the *Ricker Case,* the rule had been recognized in equity for a century or more that a trustee shall not deal with the trust funds for any purpose not connected with the trust, and shall not profit by malversation of the trust fund.

If this appellant had been dealing with his own property, he would not be expected to remember the purpose for which he gave a particular check ten or twelve years before; but the answer, "I do not know," has no place in the response of one who deals with trust funds. It is his business to know, and, to the end that he may be able to answer intelligently, he is forbidden to mingle the trust funds with his own, and is required to keep a just and true account which will disclose at all times the source of every item of income and the purpose of every item of expense. Appellant may deem himself fortunate that, in addition to the forfeiture of his compensation, the district court did not charge him with interest on the funds withdrawn from the guardian's account, and for which he offered no satisfactory explanation, indeed, no explanation at all.

4. Fault is found with the action of the trial court in fixing [9] the attorney's fee at $250. In the report filed in December, 1912, the guardian asked for only $150 for that purpose; in his amended report the amount was increased to $750. So far as disclosed by this record, there was little done by the attorney who looked after this matter; but in any event the amount to be allowed in any given case is so far within the control of the lower court's discretion that, in the absence of evidence disclosing a clear abuse of that discretion, this court will not interfere. (*Freese* v. *Pennie,* 110 Cal. 467, 42 Pac. 978.)

The order of the district court correcting and allowing the guardian's final report, and directing payment to the ward, is affirmed; as is also the order denying appellant a new trial.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STEPHENS, APPELLANT, *v.* NACEY, RESPONDENT.

(No. 3,438.)

(Submitted May 6, 1914. Decided May 26, 1914.)

[141 Pac. 649.]

Election Contests—Precincts on Indian Reservations—Residence—Illegal Votes—Duty of Contestant—Burden of Proof—Documentary Evidence—Certified Copies—Harmless Error.

Election Contests—Indian Reservations—Residence.

1. *Held,* that that portion of the Ft. Peck Indian reservation which was set aside by Act of Congress as the town site of Poplar, and which was to be disposed of under section 2381, United States Revised Statutes, relating to town sites, and part of which had been patented to occupants and purchasers of lots, is not a part of an Indian reservation, within the meaning of section 499, Revised Codes, forbidding the establishment of election precincts upon Indian reservations, and Chapter 113, Laws of 1911, fixing the residence of those living upon such reservations.

Same—Illegal Votes—Duty of Contestant.

2. Under section 7234, subdivision 4, and section 7239, Revised Codes, one who contests an election on the ground of malconduct on the part of the election judges in receiving the votes of persons residing on an Indian reservation must furnish the contestee, at least three days before the trial, a list of the voters deemed to have illegally voted; his failure to do so defeats him.

Same—Burden of Proof.

3. In an election contest in which the contestant relies upon the ground of the reception of illegal votes, the burden is upon him to show that a sufficient number of illegal votes were cast to change the result.

[As to competency of circumstantial evidence to prove for whom illegal votes were cast at election, see note in Ann. Cas. 1912C, 522.]

Documentary Evidence—Certified Copies—Harmless Error.

4. The admission in evidence of a certified copy of a copy of the original plat of a town site on an Indian reservation, on file in the office of a county clerk, though erroneous (Rev. Codes, sec. 7924), *held* nonprejudicial where it was apparent that a properly certified copy could easily be procured and that no harm resulted from the use of the objectionable copy.

Appeal from District Court, Valley County; J. Miller Smith, a Judge of the First Judicial District, presiding.

ELECTION CONTEST by James R. Stephens against Patrick Nacey. Judgment for the contestee, and contestant appeals. Affirmed.

Messrs. Norris, Hurd & McKellar, for Appellant, submitted a brief. *Mr. Edwin L. Norris* argued the cause orally.

The right to vote is neither a property right nor a right of persons, but a mere political privilege, which the legislature may regulate to any extent not prohibited by the state or federal constitutions. (*State* v. *Superior Court,* 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233; 15 Cyc. 281; 10 Am. & Eng. Ency. of Law, 2d ed., 568; Cooley's Constitutional Limitations, 6th ed., 752; *Riter* v. *Douglas,* 32 Nev. 400, 109 Pac. 444; *Russell* v. *State,* 171 Ind. 623, 87 N. E. 13; *Savage* v. *Umphries* (Tex. Civ.), 118 S. W. 893; *Morris* v. *Colorado etc. Ry. Co.,* 48 Colo. 147, 139 Am. St. Rep. 268, 20 Ann. Cas. 1006, 31 L. R. A. (n. s.) 1106, 109 Pac. 430; *Healey* v. *Wipf,* 22 S. D. 343, 117 N. W. 521; *Coggeshall* v. *Des Moines,* 138 Iowa, 730, 128 Am. St. Rep. 221, 117 N. W. 309; *State* v. *Goldthait,* 172 Ind. 210, 87 N. E. 133; *Dewalt* v. *Bartley,* 146 Pa. 529, 28 Am. St. Rep. 814, 15 L. R. A. 771, 24 Atl. 185.) It is upon this principle that registration laws, laws requiring a voter to vote in the precinct of his residence, laws requiring an educational or property test, laws arbitrarily fixing the times for opening and closing the polls, laws providing for the method of voting, the nomination of candidates, the form of ballot to be used, *etc.,* are made to rest. (*State* v. *Superior Court, supra.*) As to the extent to which a legislature may go in enacting legislation to protect the purity of elections, see *Sclon* v. *State,* 54 Tex. Cr. 261, 114 S. W. 349.

Requirements of law relative to the place of holding elections are mandatory, and an election held at a place not authorized by law is void. (McCrary on Elections, 4th ed., sec. 176; 15 Cyc. 343; 10 Am. & Eng. Ency. of Law, 2d ed., 686, 687; *Goree* v. *Cahill,* 35 Okl. 42, 128 Pac. 125; *Johnstone* v. *Robertson,* 8 Ariz. 361, 76 Pac. 465; *Walker* v. *Sanford,* 78 Ga. 165, 1 S. E. 424; *Melvin's Case,* 68 Pa. 333; *Williams* v. *Potter,* 114 Ill. 628, 3 N. E. 729; *Dickeys* v. *Hurlburt,* 5 Cal. 343.)

The Constitution does not define the term "residence" or prescribe how it may be gained or lost, or what constitutes a

residence for voting purposes. The legislature, therefore, has full power so to do. (Cooley's Constitutional Limitations, 200; *Missouri River Power Co.* v. *Steele,* 32 Mont. 433, 80 Pac. 1093; *In re Boyce,* 27 Nev. 299, 1 Ann. Cas. 66, 65 L. R. A. 47, 75 Pac. 1.) Section 2 of Article IX of the Constitution in effect provides that the legislature may prescribe the period of residence for voting purposes in a county or precinct. The term "residence" used in the Constitution and statutes of this state has various meanings. (Const., Art. IX, sec. 2; Art. VII, sec. 1; Art. IX, sec. 3; Rev. Codes, sec. 32.) The term "residence" means more than physical presence in a community. (See *Hale* v. *Stimpson,* 198 Mo. 134, 95 S. W. 885; *Silvey* v. *Lindsay,* 107 N. Y. 55, 13 N. E. 444; *Wolcott* v. *Holcomb,* 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 837; *Powell* v. *Spackman,* 7 Idaho, 692, 54 L. R. A. 378, 65 Pac. 503.) In the case of *People* v. *Dibble,* 16 N. Y. 203, a statute of that state prohibiting persons from going upon an Indian reservation and providing for their summary removal therefrom was upheld. This decision was afterward upheld by the supreme court of United States in *New York* v. *Dibble,* 21 How. (U. S.) 366, 16 L. Ed. 149. If a state may prohibit a person from going upon an Indian reservation, the law may prohibit such persons from acquiring voting residences thereupon.

It will be urged by the respondent that certain persons who voted at Poplar precinct and who resided within the town site of Poplar were not residing on an Indian reservation and were therefore qualified electors, and that the polling place which was situated upon Great Northern right of way was not on an Indian reservation. This position of respondent necessarily assumed that persons residing outside of Poplar town site were not qualified electors. From this position of the respondent it is clear that approximately two-thirds of the votes cast at Poplar precinct were tainted with illegality. Before the respondent could claim any votes cast in that precinct, it was necessary for him to purge the poll. (*Lloyd* v. *Sullivan,* 9 Mont. 577, 24 Pac. 218; *Russell* v. *McDowell,* 83 Cal. 70, 23 Pac. 183; *Ryan* v. *Town of Waurika,* 29 Okl. 655, 119 Pac. 220.)

That the legislature intended to include within the term "on an Indian reservation" all persons living within the exterior boundaries of such reservation appears to be too obvious to require argument. The purpose of this legislation would be defeated were it interpreted to have reference to the character of the title to the land within such reservation. The control of the Fort Peck Indian reservation by the government is as complete as it was before the survey of the town site of Poplar and the filing of the plat thereof. In the case of *Deroya* v. *Hill Investment Co.*, 33 Okl. 663, 127 Pac. 444, the supreme court of Oklahoma, in determining the meaning of the term "residing on an Indian reservation" held that it connotes all persons who live within the exterior boundaries of such reservation without regard to the character of the title of the land. To the same effect are *United States* v. *Certain Property*, 1 Ariz. 31, 25 Pac. 517; *State* v. *Hitchcock*, 185 U. S. 373, 46 L. Ed. 954, 22 Sup. Ct. Rep. 650.

The Indian right of occupancy to the Fort Peck Indian reservation, or to any part thereof, so far as the record discloses, has not been extinguished. The land included therein, therefore, retains the character of Indian reservation and Indian country attached to it by the statute creating such reservation, and until the Indian right of occupancy shall have been extinguished, it will retain such character. (*Buttz* v. *Northern Pac. Ry. Co.*, 119 U. S. 55, 30 L. Ed. 330, 7 Sup. Ct. Rep. 100; *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. Ed. 440; *Clark* v. *Smith*, 13 Pet. (U. S.) 195, 10 L. Ed. 123; *Byrne* v. *Alas*, 74 Cal. 628, 636, 16 Pac. 523; *State* v. *Kennard*, 57 Neb. 711, 78 N. W. 284; *Kreuger* v. *Schultz*, 6 N. D. 310, 70 N. W. 269; *Atlantic & P. R. Co.* v. *Mingus*, 165 U. S. 413, 41 L. Ed. 770, 17 Sup. Ct. Rep. 348; *Atlantic & P. R. Co.* v. *Laird*, 164 U. S. 393, 41 L. Ed. 485, 17 Sup. Ct. Rep. 120; *Jones* v. *Meehan*, 175 U. S. 1, 44 L. Ed. 49, 20 Sup. Ct. Rep. 1; *Clairmont* v. *United States*, 225 U. S. 551, 56 L. Ed. 1201, 32 Sup. Ct. Rep. 787.)

Mr. John L. Slattery and *Messrs. Purcell & Horsky* submitted a brief; *Mr. R. R. Purcell* and *Mr. Antone J. Horsky* argued the cause orally.

The Fort Peck Indian reservation is a part of Valley county. The jurisdiction of the state extends over the Indian reservation; and all white men residing on the reservation and Indians who have dissolved their tribal relations are amenable to the laws of the state, and their property is taxable the same as any other resident of the state of Montana. (*Cosier* v. *McMillan*, 22 Mont. 484, 56 Pac. 965; *Stiff* v. *McLaughlin*, 19 Mont. 300, 48 Pac. 232; *State* v. *Campbell*, 53 Minn. 354, 21 L. R. A. 169, 55 N. W. 553; *Torrey* v. *Baldwin*, 3 Wyo. 430, 26 Pac. 908; *Moore* v. *Beason*, 7 Wyo. 292, 51 Pac. 875.) Qualified electors residing upon this reservation have the same right to vote as the qualified electors who do not reside upon the reservation, but to deprive them of an election precinct or of a polling place, or to require that the polling place shall be established a great distance from their habitation, in effect deprives them of the right of suffrage. The right of a citizen to vote, granted him by the Constitution cannot be impaired or taken away, even by an Act of the legislature. (*Morris* v. *Powell*, 125 Ind. 281, 9 L. R. A. 326, 25 N. E. 221; *Spier* v. *Baker*, 120 Cal. 370, 41 L. R. A. 196, 52 Pac. 659; *Attorney General* v. *Common Council of Detroit*, 78 Mich. 545, 18 Am. St. Rep. 458, 7 L. R. A. 99, 44 N. W. 388; *Earl* v. *Lewis*, 28 Utah, 116, 77 Pac. 235; 10 Am. & Eng. Ency. of Law, 2d ed., 573.) The cases of *State* v. *Denoyer*, 6 N. D. 586, 72 N. W. 1014, *State ex rel. Crawford* v. *Norris*, 37 Neb. 299, 55 N. W. 1086, and *Hankey* v. *Bowman*, 82 Minn. 328, 84 N. W. 1002, establish conclusively the contention we are making, namely, that citizens of the United States living upon an Indian reservation and possessing the constitutional qualifications have the same right to vote as citizens residing in any other part of the state; and that if qualified electors reside upon an Indian reservation, it is the duty of election officials to establish voting precincts for them. Even the Indians living upon their reservations, after complying with certain requirements as pointed out in these cases, are entitled to vote; and yet this court is asked to deny to the white citizens, qualified electors residing within the boundaries of an Indian reservation,

the same right. They also lend force to the argument that the sections of our statute, relied upon by appellant, are unconstitutional and void; and, in fact, we believe they are conclusive on that point.

The jurisdiction of the Interior Department over the allotment of Indian lands, as well as the segregation of town sites, and the laying out and platting of the same and determining to whom the lots should be scheduled, is exclusive (*Brennan* v. *Shanks*, 24 Okl. 563, 103 Pac. 709), and the appellant cannot, in a collateral proceeding, seek to show that there is some outstanding title held by the Indians. It is not disputed that the United States government owns the fee in the lands embraced within the boundaries of this reservation, and that it is the source of title to this land. (*Spalding* v. *Chandler*, 160 U. S. 394, 40 L. Ed. 469, 16 Sup. Ct. Rep. 360.) The court, in the above case, says that the only title held by the Indians is merely a title and right to the occupancy of the land for the uses and purposes designated. Whenever a grant is made by the government of lands within an Indian reservation, and the grant necessarily demands the possession of the lands granted, the Indian title of occupancy is extinguished and the land so granted is no longer a part of the reservation. (See, also, *Missouri, K. & T. R. Co.* v. *Roberts*, 152 U. S. 114, 38 L. Ed. 377, 14 Sup. Ct. Rep. 496; *United States* v. *Alaska Packers' Assn.*, 79 Fed. 152.)

Applying the rules of law laid down in these cases to the facts in the case at bar, only one conclusion can be reached, and that is: that the land within the boundaries of this town site, as well as the right of way of the Great Northern Railway, had been segregated from the reservation proper, and the Indian title or right of occupancy in both had been extinguished for more than a year prior to the last general election, because the issuance of patents to the residents of Poplar town site and the grant of the right of way to the Great Northern Railway necessarily presupposed possession by the grantees, which of itself, under the authorities just considered, operated to extinguish

the Indian title or right of possession. The railway company had to take possession of its right of way to transact its business; the grantees named in the patents had to take possession of their lots in order to improve them. It was necessarily presupposed, when the patents were issued, that the grantees therein named would get a title in fee simple and the right to the absolute possession of the lots described in those patents without any outstanding title of any kind or character in the Indians or anybody else, whereby the right to possess and occupy them might in any way be questioned or interfered with. "A patent, regularly signed, sealed, countersigned and duly recorded, passes to the grantee a perfect right to the possession of, and title to that part of the public domain for which it calls." (*United States* v. *Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Moore* v. *Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Johnson* v. *Drew*, 171 U. S. 93, 43 L. Ed. 88, 18 Sup. Ct. Rep. 800; *Shepley* v. *Cowan*, 91 U. S. 330, 23 L. Ed. 424.) "A patent justifies a presumption that all previous requisites of the law have been complied with." (10 Ency. of U. S. Sup. Ct. Rep. 37; *Polk* v. *Wendal*, 9 Cranch, 87, 3 L. Ed. 665.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Election contest involving title to the office of sheriff of Valley county. Heretofore a judgment by the district court dismissing the contest for want of jurisdiction was reversed, and it was directed that the right to the office be determined as it should be made to appear under the issues of fact presented by the pleadings. (*Stephens* v. *Nacey*, 47 Mont. 479, 133 Pac. 361.) The allegations in the original statement impeached the legality of the vote cast at polling place No. 1, of Saco precinct, and the entire vote cast at Poplar precinct. Prior to the trial the contestant, by leave of court, amended the statement so as to eliminate the allegations impeaching the vote cast at Saco, thus leaving for determination only the question whether the vote as cast at Poplar precinct was properly re-

turned by the judges and clerks of election at that precinct and included by the board of canvassers in ascertaining the result. According to the result as declared by the board, the contestant received a total of 1,084 and the contestee 1,110 votes, thus showing the election of the contestee by a plurality of 26 votes. At Poplar precinct there were cast for the contestant and contestee a total of 56 votes, of which the former received 11 and the latter 45. If, therefore, the vote at this precinct should be rejected, it would leave the totals 1,073 for the contestant, and 1,065 for the contestee, thus establishing the election of the former by a plurality of 8 votes. It is alleged that all the votes cast at Poplar precinct were illegal, and should have been rejected by the board of canvassers, for the reasons: That the town of Poplar is situated on the Ft. Peck Indian reservation; that the boundaries of Poplar precinct are wholly within the boundaries of the reservation; that it was not lawful to establish a precinct there; that all the persons who cast their votes there resided upon the reservation, and therefore, not being residents of the state of Montana, were not qualified electors; and that, in receiving and counting their votes and including them in the sum total of the votes cast, the judges of election and the board of county canvassers were guilty of malconduct in the performance of their duties. The issues joined upon these allegations the court found generally in favor of the contestee and, directed judgment to be entered accordingly. Contestant has appealed.

Section 499 of the Revised Codes declares: "No officer of this state, nor of any county, must establish a precinct within the limits of any county not fully organized, or at any Indian agency, or at any trading post in the Indian country or on any Indian reservation."

In section 21, Chapter 113 of the Laws of 1911 (Laws 1911, p. 223), are found these provisions:

"1. That place must be considered and held to be the residence of a person in which his habitation is fixed and to which, whenever he is absent, he has the intention of returning.

"2. A person must not be held to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, * * * nor while a student at any institution of learning, nor while kept at any almshouse or other asylum at the public expense, nor while confined in any public prison, nor while residing upon any Indian or military reservation."

"11. Any person living upon an Indian or military reservation shall not be deemed to be a resident of Montana, within the meaning of this chapter, unless such person has acquired a residence in some county in Montana prior to taking up his residence upon such Indian or military reservation; provided, that if such person shall not be in the employ of the government while residing upon such Indian or military reservation, such person shall not be considered a resident of the state of Montana."

These provisions, so far as they apply to this case, may be summarized as follows: (1) That the residence of an elector for voting purposes is at the place of his fixed habitation to which, when absent therefrom, he expects to return; (2) that a voting precinct cannot lawfully be established upon an Indian reservation; (3) that after a person has gained a residence in any county of the state, he does not lose his residence or acquire another by living upon an Indian reservation—in other words, his residence for voting purposes remains at the place where he acquired it before going upon the reservation; and (4) that a person who has not theretofore acquired a residence in some county at a place off the reservation shall not be deemed a resident of Montana by virtue of his residence upon the reservation, unless he shall be in the employ of the government while upon the reservation.

Counsel have discussed extensively in their briefs the validity of the foregoing provisions; counsel for the contestee urging that they are repugnant to several provisions of the Constitution, in that they arbitrarily deprive qualified electors of their right to vote as guaranteed by that instrument. As we view the case, it is not necessary to determine any of the questions

presented and discussed in this behalf. Upon the facts ad-
[1] mitted or proven at the trial (there was no substantial conflict in the evidence), the trial court concluded that it was lawful for the county commissioners to establish a voting precinct at Poplar, because it is not upon an Indian reservation, within the meaning of section 499, *supra;* that the persons who cast their votes there were qualified electors; and that the return of the vote, as made by the clerks and judges, was properly canvassed, and included in the estimate of the board of county commissioners ascertaining the final result.

These facts are not disputed: By an Act of the Congress approved February 15, 1887 (24 Stat. 402, Chap. 130), there was granted to the St. Paul, Minneapolis and Manitoba Railway Company a right of way 150 feet in width across the lands included in the Ft. Peck Indian reservation, from east to west. The grant also included other lands adjacent to the line of road at station points, to the extent of 300 feet in width and 3,000 feet in length, for station buildings, shops, *etc.* Subsequently the Great Northern Railway Company succeeded to the rights of the original grantee, and has since occupied the right of way with its railroad. By section 3 of the Act of Congress, providing for the survey and allotment of the lands embraced within the limits of the reservation and for the sale of the surplus lands after allotment, approved May 30, 1908 (35 Stat. 558, Chap. 237), the original grant was supplemented by a grant of other lands along the right of way for reservoirs, dam sites, *etc.,* for use in connection with the operation of the railroad. By section 14 of the latter Act the Secretary of the Interior was authorized to reserve and set aside for a town site at Poplar, a settlement which had grown up near the agency located there, and about midway between the east and west boundaries of the reservation, a tract of land of not less than forty acres. He was directed to have this surveyed, laid out and platted into lots, streets, alleys and parks, and thereupon to dispose of the lots by sale, as provided by section 2381 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 1455; 3 Fed. Stats. Ann., p. 583), relating to town

sites on public lands. There was reserved, however, to persons actually occupying lots at the time of the survey the right to make entries thereof for patents prior to the time fixed for public sale. Under the authority thus conferred, a town site of 130.82 acres was reserved, and the plat of it was filed in the General Land Office at Washington prior to October 30, 1909, and subsequently a copy was filed in the local land office at Glasgow. The town site is on the line of the railroad, and its south boundary is the north line of the railroad right of way. Prior to the date of the election in November, 1912, which gave rise to this contest, many patents had been issued to occupants and purchasers of lots, and at that time the population residing in the settlement and engaged in trade and other occupations amounted to about 600. Since the date of the creation of the town site the federal government has treated it as not a part of the reservation, for purposes of trade with the Indians, in that it has ceased to require persons engaged in trade there to obtain a license. Moreover, from the time patents have issued, the lots have been assessed and taxed for state and county purposes, the same as real estate owned by residents in Valley county outside of the reservation, and the same as the right of way and other lands held by the Great Northern Railway Company. The Indian agency is on land outside of the town site.

It is conceded by counsel for contestant that at the date at which the grant to the railway company became effective the Indian title to the lands granted was extinguished, and that they at once became segregated from the reservation and subject to the jurisdiction of the state government. It is insisted, however, that, since Poplar is within the boundaries of the reservation, and it does not appear that the Indian title to the land reserved for the town site has been extinguished, it still retains the character of Indian country, and hence the establishment of a precinct and the reception of votes there was in contravention of the provisions of section 499 of the statute *supra*.

We think the concession of counsel that the grants of the right of way and other lands for railroad purposes operated to extinguish the Indian title to the lands granted carries with it necessarily the concession that the establishment of the town site extinguished the Indian title to the lands included within it also; for, so far as we have been able to ascertain, the grants for railroad purposes were made without consent of the Indians by treaty or otherwise, and by force of the Act of Congress making them, without reservation of any right in favor of the Indians. The reservation of a town site for the purpose of sale of lots to occupants or anyone else who might purchase them was made in the same way; and it must be that, if, by virtue of the Acts making the grants to the railway companies, the federal government renounced jurisdiction over the subject of them, for the same reason, by setting aside the town site and granting patents to the lots therein to private citizens, it renounced jurisdiction over it for all other purposes than to dispose of the lots, and it thereby became subject to the jurisdiction of the state for general governmental purposes.

It is true that when Montana was admitted into the Union the federal government retained, and the people of Montana conceded to it, absolute control of, and jurisdiction over, all lands lying within the state "owned or held by any Indian or Indian tribes," until the title thereto should be extinguished by the federal government. (Act Feb. 22, 1908, Chap. 180; 25 Stat. 676, sec. 4; Mont. Const., Ordinance 1.) It is also true that, when lands are reserved for the use of Indians, the fee is under the control of the federal government, and that the manner, time, and conditions on which their title shall be extinguished are matters to be determined exclusively by the government. (*Missouri, K. & T. Ry. Co.* v. *Roberts*, 152 U. S. 114, 38 L. Ed. 377, 14 Sup. Ct. Rep. 496; *Spalding* v. *Chandler*, 160 U. S. 394, 40 L. Ed. 469, 16 Sup. Ct. Rep. 360.) It is none the less true that when a grant is made of any part of such lands to a railway company for its right of way, and the grant is absolute in its terms, giving to the grantee

the right of possession and occupancy for the purposes of the grant, such grant must of necessity extinguish entirely the Indian title. It was so held by the supreme court of the United States in *Spalding* v. *Chandler, supra,* as to the title to a right of way for a canal, granted by the Congress in 1852, over a reservation occupied by the Chippewa Indians in the state of Michigan. In the course of the opinion, the court, through Mr. Justice White, said: "Whatever the reason, however, for the omission to make mention of the Indian reserve, the power existed in Congress to invade the sanctity of the reservation, and disregard the guaranty contained in the treaty of 1820, even against the consent of the Indians, party to that treaty; and, as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass, the effect of that Act was to extinguish so much of the Indian reserve as was embraced in the grant to the state for canal purposes." The same conclusion was announced in *Missouri, K. & T. Ry. Co.* v. *Roberts, supra,* with reference to the grant by Congress to the railway company of a right of way through the country of the Osage Indians, in Kansas in 1866. The court there, through Mr. Justice Field, stated the rule as follows: The "grant was absolute in its terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration." Also in the recent case of *Clairmont* v. *United States,* 225 U. S. 551, 56 L. Ed. 1201, 32 Sup. Ct. Rep. 787, it was held that, since the title to the right of way of the Northern Pacific Railway Company through the Flathead Indian reservation had been extinguished by treaty with the Indians, it is no longer Indian country, within the meaning of the Act of Congress of January 6, 1897 (29 Stat. 506, c. 109), prohibiting the introduction of intoxicating liquor into Indian country.

It is entirely competent for Congress, by treaty stipulation with the Indians, where their lands have been allotted to them in severalty under provisions by which they become citizens of the United States, to retain jurisdiction over the allotted

lands for the purpose of preventing the introduction of intoxicating liquors, and this jurisdiction may extend to adjacent lands the title to which is surrendered by the Indians to the United States, until otherwise directed by Congress. The leading case on this subject is *United States* v. *Forty-three Gallons of Whisky*, 93 U. S. 188, 23 L. Ed. 846. This involved the right of traders to introduce intoxicating liquors upon lands which had been ceded to the United States by treaty by the Chippewa Indians in the state of Minnesota. The lands in question were included in an organized county of the state, and were subject for general purposes to the state government. While recognizing the right of the state to assume jurisdiction for other purposes, the court declared that it is competent for the federal government under its treaty-making powers to keep in force upon the ceded lands the legislation of Congress prohibiting the introduction thereon of intoxicating liquors, notwithstanding any law of the state in conflict therewith, without infringing in any way upon the principle of state sovereignty. The court said: "The power to make treaties with the Indian tribes is, as we have seen, coextensive with the power to make treaties with foreign nations. And it cannot be doubted that the treaty-making power is ample to cover all the usual subjects of diplomacy with different powers. One of these subjects relates to the acquisition and distribution of property belonging to the citizens or subjects of each in the territory of the other. A treaty embracing this matter may contravene the statutes of a state; but, if it does, the courts would disregard them and give to the alien the full protection accorded him by the treaty. If this result can be obtained by treaty with a foreign nation, surely the federal government can, in the exercise of its power to treat with Indians, make provision over a subject like the present, coming, as it does, within the clause relating to the regulation of commerce."

In the case of *Dick* v. *United States*, 208 U. S. 340, 52 L. Ed. 520, 28 Sup. Ct. Rep. 399, the court upon the same principle sustained a conviction for a violation of the federal statute by the plaintiff in error (Act July 23, 1892, 27 Stat. 260,

Chap. 234), by introducing intoxicating liquor upon the Nez Perce reservation, in the state of Idaho. The village of Culdesac, where the offense was committed, was a village organized under the laws of Idaho. The lands upon which it was located were a part of the lands ceded to the United States under a treaty with the Indians made in 1893. In this treaty it was stipulated that the ceded lands should be subject to the federal laws prohibiting the introduction of intoxicating liquors into the Indian country for the period of twenty-five years. The court held that, though the title to the lands upon which the village was situated had been transferred to the probate judge of Nez Perce county, the laws of the federal government were, by virtue of treaty, paramount to the authority of the state upon the subject of the introduction and sale of intoxicating liquor.

It will be observed that the court in both these cases distinctly assumed that the power of the state for governmental purposes over lands to which the Indian title has been extinguished is not restricted, except so far as it is limited by the act of extinguishment. Therefore it cannot be controverted, we think, that, subject to the conditions imposed at the time of extinguishment, whether accomplished under the treaty-making power of the federal government or by an Act of Congress, the jurisdiction of the state authorities is extended over all such lands within its limits for all governmental purposes whenever the federal government parts with its title. The owners become subject to the payment of taxes upon them for state purposes (*State ex rel. Commissioners* v. *State Board of Equalization*, 18 Mont. 389, 45 Pac. 553), and hence are entitled to all the rights and privileges of other citizens under the laws of the state. We therefore hold that all persons residing upon the right of way of the Great Northern Railway Company and in the village of Poplar, which adjoins it, who have acquired a residence there and possess the other qualifications necessary to entitle them to vote, are, under the provisions of the state statute, electors, and that it was competent for the board of commissioners to establish a precinct at Poplar

to make it convenient for them to exercise their rights as such. While we think the boundaries of the precinct should not have included any territory other than the granted lands, the fact that it did, did not constitute it a precinct upon an Indian reservation within the meaning of the prohibition of the statute.

It is insisted by counsel for the contestant, however, that, since it is inferable from the evidence that some of the persons who voted at Poplar did not reside either upon the lands granted to the railroad or within the limits of Poplar, it was in any event incumbent upon the contestee to purge the poll or suffer the loss of all votes cast at the precinct. This contention is without merit. The theory of the contestant, as disclosed by his statement, is that the vote cast at Poplar precinct should be rejected as a whole, because, since it was unlawful for the board of commissioners to establish a precinct there, no votes could lawfully be received there, and hence that the judges appointed to hold the election there were guilty of malconduct in opening the polls and receiving votes. In [2] other words, the malconduct charged is the receiving of votes cast in the aggregate, and not in the receiving of any specific number of illegal votes. It was pointed out in *Coleman v. Kerr*, 33 Mont. 198, 83 Pac. 393, that, under section 2010 of the Code of Civil Procedure of 1895, malconduct on the part of election officers, as specified in subdivision 1, is a wholly distinct ground of contest from that of reception of illegal votes referred to in subdivision 4, and that, when the latter was stated as the ground of contest, it was incumbent upon the contestant to furnish to the contestee, at least three days before the trial, a written list of the number of votes he deems illegal; otherwise proof of the specific illegal votes cannot be made. (Code Civ. Proc., 1895, sec. 2015.) These provisions are found in the Revised Codes as sections 7234 and 7239, and declare the rule applicable to this case. So far as is disclosed by the record, no such list was delivered to the contestee; hence contestant is not in a position to claim, under the issues as made in his statement, that any number of the votes cast were illegal.

As we read the evidence, it goes no further than to suggest, by the barest inference, that any votes were received which were open to legal objection. Under the provisions cited, the [3] burden was upon the contestant to show that a sufficient number of illegal votes were cast to change the result.

The only other point which we deem it necessary to notice [4] arises upon the ruling of the court in admitting in evidence a copy of the plat of the Poplar town site. When the original plat was filed with the Commissioner of the General Land Office in Washington, a certified copy was filed in the local land office at Glasgow. A similar copy was deposited for filing with the clerk and recorder of Valley county at Glasgow, but had not been marked "filed," because the filing fee had not been paid. The copy from the land office was exhibited to the court, and a certified copy of the copy deposited with the clerk and recorder was offered in evidence by the contestee and admitted over the objection by counsel for the contestant that it was not the best evidence, because not a certified copy of the original by the officer having it in custody. The ruling was error. (Rev. Codes, sec. 7924.) But, in view of the fact that a proper copy could easily be supplied, and that it does not appear that prejudice was wrought, by the use of the copy admitted, we shall not reverse the judgment merely for the purpose of allowing the error in this connection to be corrected.

Other contentions made by counsel are not of sufficient importance to require special notice.

The judgment is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

STATE EX REL. LOHMAN, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,475.)

(Submitted May 7, 1914. Decided May 26, 1914.)

[141 Pac. 659.]

District Judges—Disqualification—Imputed Bias and Prejudice—Affidavit—Notice—Date—Change of Venue—To What Court—Mandamus.

District Judges—Disqualification—Affidavit—Notice.

1. A party filing a disqualifying affidavit or motion for change of venue, under amended section 6315 (Chap. 114, Laws 1909), need not give notice thereof to his adversary.

[As to change of venue generally, see note in 74 Am. Dec. 241.]

Same—Affidavit—Date Immaterial.

2. The date of a disqualifying affidavit is immaterial.

Same—Power of Judges of Same District.

3. Where the business of a judicial district had been apportioned between the two judges thereof, under an agreement which did not confer on either exclusive control over any particular case from its inception to its conclusion, but provided that the judges should alternately hold terms of court in one of the counties comprising the district, leaving either judge with power to do anything in any case pending in that court which could properly be brought before it, one judge could settle the pleadings in a case and the other try it; and the fact that one heard a demurrer to a pleading did not divest the other of authority to try the case, or to order a change of venue on proper application being made therefor.

[As to authority of successor to trial judge to pass upon motion for new trial, see notes in 7 Ann. Cas. 493; 10 Ann. Cas. 327. See, also, note in Ann. Cas. 1914B, 1235.]

Same—Change of Venue—When Compulsory.

4. Where a district judge called in to try a case, because of the disqualification of the presiding judge, fails to appear and assume jurisdiction within thirty days after filing of the motion for change of venue, the presiding judge must change the place of trial.

Same—Change of Venue—To What Court.

5. Where a district judge is disqualified for imputed bias, and the judge called in to sit in his place fails for thirty days after motion for change of venue has been filed to appear and assume jurisdiction of the case, the former must transfer it to the nearest district court of another judicial district.

Same—"Nearest District Court"—Definition.

6. The nearest district court to which a cause must be transferred under the circumstances adverted to in paragraph 5 above, *held* to be the court which can be reached by the shortest route in the usual mode of travel.

Original application for writ of mandate by the state, on the relation of A. S. Lohman, against the district court of the twelfth judicial district, in and for the county of Blaine, and Frank N. Utter, a judge thereof, to compel a transfer of a cause to another district court, because of the disqualification of said judge. Writ granted.

Messrs. Norris & Hurd, for Relator, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

Messrs. O'Keefe & Kuhr, for Respondents; *Mr. R. E. O'Keefe* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On August 26, 1913, A. S. Lohman commenced an action in the district court of the twelfth judicial district of Montana, in and for Blaine county, against the town of Chinook. A demurrer interposed by the defendant was submitted to the court, Judge Tattan presiding, and overruled, and an answer which brought the case to issue was then filed. On February 21, 1914, the court, Judge Utter presiding, set the cause for trial for March 21, at a term of the court to be presided over by Judge Utter. On February 28 plaintiff filed an affidavit disqualifying Judge Utter, and on March 2 an order was entered by the disqualified judge, calling Judge Tattan to try the case, which was then reset for April 9. On April 3 plaintiff called up before Judge Utter his motion for change of venue, which motion had been filed on February 28, but the court overruled it, and this proceeding was thereupon instituted. In his affidavit, after reciting the history of the case, the relator alleges that Judge Tattan did not appear in Blaine county or assume jurisdiction of the case of *Lohman* v. *Town of Chinook* for a period of thirty days after the motion for change of venue was filed, or at all. An alternative writ of mandate was issued, and upon the return Judge Utter, for himself and the court, presented an answer, in which he sets forth that, while

he and Judge Tattan are both judges of the twelfth judicial district, they have never apportioned the business between them, but have proceeded, by a sort of process of selection under which "each of said judges assumed to select and act in all cases which have not been theretofore selected by, or of which jurisdiction has not been assumed by, the other judge of said district"; that he never intentionally assumed jurisdiction in the case of *Lohman* v. *Town of Chinook*, but through inadvertence only he set it for trial; that by considering and passing upon the demurrer Judge Tattan had selected and apportioned to himself that case as a part of the business to be transacted by him while presiding in the court in Blaine county; that at the time this case was set for trial, and at the time he called Judge Tattan to try it, he was not aware that Judge Tattan had already assumed control over this case; that Judge Tattan has not been disqualified, and for the reason the cause is pending before Judge Tattan, he deemed himself without authority to grant the motion of the relator herein for a change of venue. Upon the hearing, certain records were introduced in evidence and the proceeding submitted for our determination.

Counsel for respondents have not submitted any briefs or written argument; but in the answer filed certain questions are sought to be raised, and these will be treated in their order.

1. It was not necessary for the plaintiff (this relator), when [1] he filed the disqualifying affidavit or the motion for change of venue under the provisions of section 6315, Revised Codes, as amended by Chapter 114, Laws of 1909, to give notice to his adversary. (*State ex rel. Jenkins* v. *District Court*, 32 Mont. 595, 81 Pac. 351.)

2. The date of the disqualifying affidavit is not of conse- [2] quence. It is the filing of the affidavit which *ipso facto* works the disqualification of the judge. (*Washoe Copper Co.* v. *Hickey*, 46 Mont. 363, 128 Pac. 584; *State ex rel. Goodman* v. *District Court*, 46 Mont. 492, 128 Pac. 913.)

3. Judge Utter's position that he was without authority to grant the motion for a change of venue is not well taken. The

evidence introduced discloses that the business of the twelfth [3] judicial district has been apportioned between the two judges by a stipulation entered into between them. That arrangement did not confer upon either exclusive control over any particular case from its inception in court until its conclusion. It provided that these judges should alternately hold terms of court in Blaine county, and it left either judge with authority to do any and everything, in any case pending in that court, which could properly be brought before the court. It clearly contemplated that one judge might settle the pleadings and the other try a given case. The arrangement was apparently satisfactory to both judges, and both are bound by it until it is changed. The fact that Judge Tattan heard the demurrer did not operate to devest Judge Utter of authority to try the cause, or to change the place of trial after he was disqualified. The district court of the twelfth judicial district in and for Blaine county had jurisdiction of the case of *Lohman* v. *Town of Chinook*, and while presiding in that court Judge Utter had all the authority which is conferred upon any district judge of this state. He was bound to know what proceedings had been taken in the case, and it is immaterial that the setting of the case by him was an act of inadvertence. It was his duty to set it for trial if it was ready for trial at a term at which he was to preside, and to try it unless he was disqualified. There is some conflict between the records of the court made while Judge Utter was presiding therein and his verified answer in this proceeding, but it is not of sufficient consequence to deserve special attention.

4. When Judge Utter was disqualified by the filing of the [4] affidavit, it was his duty to call in Judge Tattan to try the cause (Chap. 114, Laws 1909, above), but as such invited judge only, Judge Tattan could not be compelled to respond to the invitation. (*State ex rel. Anaconda C. Min. Co.* v. *Clancy*, 30 Mont. 529, 77 Pac. 312.) If he failed to appear and assume jurisdiction of the case within thirty days after the motion for change of venue was filed, then it became the duty of Judge Utter to exercise the power still reserved to him by

the statute above, and change the place of trial. (Rev. Codes, sec. 6506; *State ex rel. Anaconda C. Min. Co.* v. *Clancy*, above; *State ex rel. Carleton* v. *District Court*, 33 Mont. 138, 8 Ann. Cas. 752, 82 Pac. 789.) Section 6506 above, and section 6315 as amended, are companion measures. Section 6506 provides the means by which a litigant may secure a speedy trial of his cause in the event the presiding judge is disqualified under the other section. (*State ex rel. Boston & Mont. etc. Co.* v. *Clancy*, 30 Mont. 193, 76 Pac. 10.) The amendment made to section 6315 by Chapter 114, Laws of 1909, did not affect the relationship of the two statutes. In *Bean* v. *Missoula Lumber Co.*, 40 Mont. 31, 104 Pac. 869, this court said: "When a judge is disqualified in any cause for any of the reasons enumerated in 6315, *supra*, and a motion is made to transfer it, the moving party is entitled to have the transfer made, subject, however, to the proviso that, if a qualified judge is called to try it, and appears for that purpose, within thirty days, no transfer may be made. The motion is thus held suspended for this length of time."

5. Having determined that it was the duty of Judge Utter to change the venue of the case of *Lohman* v. *Town of Chinook*, the only remaining question suggested is: To what court should [5] it have been transferred? Section 6507 requires that the cause be transferred "to the nearest court where the like objection or cause for making the order does not exist, as follows: If in a district court, to another district court." This section is a general statute applicable to changes effected for any cause for which a change of venue may be had. Chapter 114, Laws of 1909, above, is a particular statute which, in so far as it deals with the subject "change of venue," provides that if the cause for the change is disqualification of the judge under the so-called fair trial law, then the case in which the disqualifying affidavit is filed shall be "transferred to a district judge of another judicial district of the state." Reading these several statutes together, and we think the intention of the legislature was that in a case where the presiding judge is disqualified for imputed bias, and the invited judge fails for

thirty days after motion for change of venue has been filed, to appear and assume jurisdiction of the case, it then becomes the duty of the presiding judge to transfer the cause to the nearest district court of another judicial district.

6. The authorities are quite unanimous in holding that the [6] terms "nearest court" refer to the court which can be reached by the shortest route of travel in the usual mode of travel.

Tested by these rules, the relator is entitled to the relief sought, and a peremptory writ will issue forthwith.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. FROST, RESPONDENT, v. BARNETT, COUNTY TREASURER, APPELLANT.

(No. 3,423.)

(Submitted May 8, 1914. Decided May 29, 1914.)

[141 Pac. 287.]

Intoxicating Liquors—Wholesale and Retail Licenses—Statutory Construction — County Commissioners — Discretion — Nonappealable Orders.

Appeal and Error—Nonappealable Orders.

1. An order overruling a motion to quash an alternative writ of mandate is not an appealable one.

[As to what judgments and orders may be appealed from, see note in 20 Am. St. Rep. 173.]

Intoxicating Liquors—Wholesale and Retail Licenses—Distinction Abolished.

2. Since the enactment of House Bill 80 (Laws 1901, p. 143), the distinction between wholesale and retail liquor licenses has been abolished, and there is now but one license to engage in the liquor business; hence the district court erred in awarding a peremptory writ of mandate commanding a county treasurer to issue to relator a license permitting him to sell liquor at wholesale.

Same—Licenses—County Commissioners—Discretion.

3. Under section 2759, Revised Codes, providing that a person who sells liquor must obtain a license "as prescribed in this Chapter," one

who seeks a license to carry on the liquor business at a place outside the corporate limits of a city or town must, under section 2760 as amended, apply to the county commissioners, in whose discretion it lies whether to grant it or not.

[As to the power of municipal corporations to regulate the business of dealing in intoxicating liquors, see note in 114 Am. St. Rep. 298.]

Appeal from District Court, Dawson County; C. C. Hurley, Judge.

Mandamus by the state, on the relation of James Frost, against L. R. Barnett, treasurer of Dawson county. From an adverse judgment and an order overruling his motion to quash the alternative writ, defendant appeals. Appeal from order dismissed, judgment reversed, and cause remanded, with directions to dismiss the proceedings.

Mr. H. J. Haskell, for Appellant, and *Mr. Henry C. Smith,* and *Mr. William T. Piggott* submitted a brief; *Mr. Smith* and *Mr. Piggott* argued the cause orally.

Messrs. Anderson & Foss, for Respondent, submitted a brief; *Mr. Anderson* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On August 29, 1913, James Frost made application to the county treasurer of Dawson county for a license to sell spirituous, malt, vinous, distilled and fermented liquors in quantities not less than a quart, and not to be drunk upon the premises where the business was to be conducted. With the application there was tendered the required fee for a license to do business in a place having less than 300 inhabitants, and also the fee of one dollar for issuing the license. The treasurer refused the application, and a proceeding in *mandamus* was instituted. In his affidavit for the writ the relator set forth that he is a citizen of the United States; that the place where he proposed to conduct his business has less than 300 inhabitants, and is not in an incorporated city or town. An alternative writ was issued, and upon the return a motion to

quash was interposed. The motion was overruled, and the treasurer, refusing to plead further, suffered a judgment awarding the peremptory writ to be entered against him, and appealed.. There is also an attempt to appeal from the order [1] overruling the motion to quash, but, as that is not one of the orders enumerated in section 7098, Revised Codes, it is not appealable.

The appeal from the judgment presents an interesting question. In order to entitle him to the writ of mandate, it was [2] necessary for relator, Frost, to show that, upon tendering to the county treasurer the proper fee, he was entitled to the license demanded, as a matter of right; and whether he makes that showing is the question for our determination.

In the Political Code of 1895 the subject "Licenses" is treated in Chapter XIII, Part III, Title X. Section 4063 provided: "Every person who sells spirituous, malt, or fermented liquors or wine, in less quantities than one quart, must obtain license from the county treasurer, as prescribed in this Chapter, and make therefor the following payment." Then follow certain schedules regulating the amount of the license fee according to the population of the place where the business was to be carried on. Section 4064 provided that every person who at a fixed place of business sells goods, wares or merchandise, wines or distilled liquors must obtain from the county treasurer a license. The amount of the license fee was regulated according to the estimated monthly sales. Section 4065 provided: "The sale of liquors and wines by persons licensed under the preceding section must not be in less quantity than one quart."

Leaving out of consideration licenses authorized to be issued to brewers, distillers, manufacturers, rectifiers and malsters, as not involved in any manner in this controversy, and we had liquor licenses classified by the Codes of 1895 into two classes, which, for want of more appropriate names, will be designated retail licenses and wholesale licenses. Section 4063 above, dealt with the retail licenses, and sections 4064 and 4065 with the wholesale licenses. In our consideration of this subject

it is to be borne in mind constantly that in the sections of the Code just referred to, and in all the legislation hereafter considered the subject under consideration was licenses, not the liquor business.

In 1897 sections 4063, 4064, and 4065 were amended (*State* v. *Courtney*, 27 Mont. 378, 71 Pac. 308), but the classification of licenses as retail licenses and wholesale licenses was retained (Laws 1897, p. 198). In 1901 the legislative assembly passed House Bill 80, which so far amended the law relating to liquor licenses as to destroy the classification altogether. That Act provided for only one form of liquor license, in the following terms: "Every person, who sells or offers for sale, directly or indirectly, any spirituous, malt, vinous, distilled or fermented liquors or wines, must obtain a license therefor from the county treasurer." And this provision was followed by a schedule of the rates based upon the population of the place where the business was to be conducted. (Laws 1901, p. 143.) Under House Bill 80, a person rightfully in possession of a liquor license could engage in the liquor business and sell at wholesale or at retail, as he chose. There was but one form of license, and that simply authorized the holder to engage in the liquor business. In 1905 House Bill 80 was amended, but only in respect to the schedule of fees. (Laws 1905, p. 174.) At the same session of the legislature Chapter 71 was enacted entitled: "An Act to regulate the issuance of licenses of retail liquor dealers in cities, towns, villages or camps containing a population of less than one hundred." This Act did not assume to change the form of the liquor license or to affect the license in any manner whatever. By section 1 it regulated the method by which the only form of liquor license known to the law could be procured by one who sought to engage in the liquor business in a city, town, village or camp having less than 100 inhabitants. The fact that the Act refers only to retail liquor dealers is of no significance here. There was but one form of liquor license authorized by law, and anyone who procured a license under the Act could have sold either at retail or at wholesale. The purpose of the Act was not to define "retail liquor dealers,"

but to require from the applicant for license who sought to engage in the business in an isolated place or a small community a petition signed by at least twenty freeholders residing in the immediate community where the business was to be carried on. It further took from the county treasurer the sole authority to grant the license; it lodged the power to order the license in the board of county commissioners, and, by section 2, clothed the members with a certain degree of discretion. (Laws 1905, p. 154.) In the codification of 1907, House Bill 80, with the slight amendments made in 1905, above, was carried forward as section 2759 of Chapter XIII, which Chapter is entitled "Licenses"; while section 1, Chapter 71, of the Laws of 1905 was carried forward as section 2760, and section 2 as section 2761 of the same Chapter. In 1909 the legislature passed Chapter 1, entitled: "An Act to approve, legalize and adopt the division and arrangement of the Revised Codes of Montana of 1907." Section 1 of that Chapter reads as follows: "The division and arrangement into codes, parts, titles, chapters, articles and sections of the Revised Codes of Montana of the year 1907, as reported by the code commissioner, appointed under the authority of Chapter 85 of the Laws of the Tenth Legislative Assembly of the state of Montana, are hereby approved, confirmed, legalized and made effectual and valid, and it shall be sufficient reference to any law in said Codes, in citing or amending the same, to give the number of the section and to add thereto the words 'Revised Codes of 1907.'" Chapter 92 of the Laws of 1911 is entitled: "An Act limiting the number of licenses which may be issued for the sale of intoxicating liquors, and regulating the issuance of such licenses, and providing for a revocation of license upon conviction of a penal offense." Section 3 of the Act provides that every person who desires to engage in the business of retail liquor dealer in any place not within the corporate limits of any city or town must obtain a license from the county treasurer. It requires the applicant to present to the board of county commissioners a petition signed by at least twenty freeholders requesting the issuance of such

license. It requires the board of commissioners to give notice and provides for a hearing of any protest. This Act was, in effect, an amendment to section 2760 of the Revised Codes, though not designated such by name. By Chapter 35 of the Laws of 1913, some amendments were made to Chapter 92 of the Laws of 1911, but they do not reflect upon the question now before us.

In every enactment since House Bill 80 was adopted, by which the classification of liquor licenses was abolished, the references to retail liquor dealers are but the loose expressions of legislators, and are not significant in the consideration of the particular question before us. There has never been since 1901 any attempt to re-establish two or more classes of liquor licenses. Every Act has had to do with the fees for the license or the method of procuring it, and not with the license itself. Anyone rightfully in possession of a liquor license since 1901 could sell at retail or at wholesale, and, if this relator is entitled to any license at all, he is entitled to the only form of license which is authorized by law, *viz.*, one which will authorize him to engage in the liquor business and under which he can sell at wholesale or at retail, as he chooses. The county treasurer cannot, by writing into the license something which the law does not authorize, limit the relator's right to sell at wholesale only; and neither does respondent's application for the license form any part of it or limit him in the manner in which he may dispose of his stock of liquors, if he secures a license authorizing him to engage in the liquor business.

The relator is not entitled, as a matter of right, to a license to carry on the liquor business outside of the corporate limits of any city or town. Section 2759 provides that every person who sells liquor must obtain a license "as prescribed in this Chap-
[3] ter," and, because this relator seeks to carry on his business at a place outside the corporate limits of a city or town, section 2760, as amended by the Acts of 1911 and 1913, requires him to apply to the county commissioners, and even then the matter of granting or refusing the license is one which is ad-

dressed to the discretion of the board. The phrase "as prescribed in this Chapter" is not meaningless. When the legislature adopted Chapter 1 of the Laws of 1909, above, they adopted the arrangement of the Codes, as well as the substance of them. In effect, the legislature said: "The phrase 'as prescribed in this Chapter,' when used in section 2759 shall hereafter refer to the mode of procedure outlined in section 2760 as amended."

The relator did not pursue the method prescribed by that section, and therefore was not entitled to a license. He was not entitled to the particular relief demanded, because his request was for a wholesale liquor license, and there is not any such thing known to the law of this state.

The pretended appeal from the order overruling the motion to quash is dismissed. The judgment is reversed and the cause remanded, with directions to dismiss the proceeding.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

JUNE TERM, 1914.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,
THE HON. SYDNEY SANNER,
} Associate Justices.

MIDDLEFORK CATTLE CO., APPELLANT, *v.* TODD, RESPONDENT.

(No. 3,201.)

(Submitted May 26, 1914. Decided June 3, 1914.)

[141 Pac. 641.]

Default Judgments—Vacation—Principal and Agent—Fraud—Brokers—Complaint—Sufficiency.

Default Judgments—Vacation—Finding of Trial Court—Conclusive, When.

1. Where the disputed questions of fact presented by affidavits filed in support of, and in opposition to, a motion to open a default, are of such character as to leave the trial court in a more advantageous position in considering them than is the supreme court in reviewing the order granting the motion, the finding of the lower court is conclusive.

Brokers—Fraud—Complaint—Sufficiency.

2. *Held* that a complaint alleging that plaintiff employed defendant to sell land for a certain sum at a given commission; that defendant falsely represented to plaintiff that in order to effectuate a sale the selling price would have to be lowered; that this was believed by plaintiff who thereupon executed a deed for such reduced consideration; that at the time such representation was made defendant had negotiated a sale at the price originally fixed; that plaintiff was thus defrauded out of the difference between the original selling price and the amount actually received by him; and that he had made demand upon defend-

ant for restitution but had been refused,—was sufficient to constitute a cause of action.

[As to actions to recover for false representations, see note in 18 Am. St. Rep. 555; and as to same in connection with sales of real estate, see note in 2 Am. Dec. 77.]

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

ACTION by the Middlefork Cattle Company against Ira E. Todd. From an order vacating a default judgment, plaintiff appeals. Reversed.

Messrs. Freeman & Thelen, for Appellant, submitted a brief; *Mr. Jas. W. Freeman* argued the cause orally.

Messrs. J. W. Speer and *F. A. Ewald* submitted a brief in behalf of Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On August 30, 1911, the Middlefork Cattle Company commenced an action in the district court of Cascade county against Ira E. Todd. Personal service of the summons was made on September 15, and on October 9 the default of defendant for want of an appearance was entered, and on October 13 a judgment was rendered in favor of the plaintiff agreeably to the prayer of the complaint. Defendant immediately made a motion to set aside the judgment, open the default, and permit an answer to be filed. The motion was supported by affidavits, and a proposed answer was tendered. A counter-affidavit was presented by counsel for plaintiff, and on February 20, 1912, the district court entered its order as follows: "It appears to the court that defendant has not shown that judgment was entered against him through his mistake, inadvertence, surprise or excusable neglect; but it further appears to the court that the complaint does not state facts sufficient to constitute a cause of action against the defendant, and does not support the judgment. It is therefore ordered that said motion be, and the same

is hereby, sustained, and that said default be, and the same is hereby, set aside, and that judgment entered in said action be, and the same is hereby, vacated." From that order, plaintiff appealed.

Counsel for respondent invoke the rule that, if the decision of the court was correct for any reason, it will be sustained, even though the particular reason assigned in the order is erro-
[1] neous. The disputed questions of fact presented by the affidavits are of such character that we are not in the same advantageous position in considering them as was the trial court, and, for this reason, the finding is conclusive against the defendant upon this appeal. Aside from the disputed questions of fact, counsel for defendant in their affidavits do not present any legal excuse for the default. They merely disclose that they prepared a demurrer in time, but neglected to file it.

It is unfortunate that the learned trial judge did not indicate
[2] the particulars in which he deemed the complaint insufficient. We have given it careful consideration, and are unable to discover any fatal defect. Stripped of its legal phraseology and repetition, and reduced to plain, terse English, the complaint charges (a) that plaintiff employed defendant, a real estate agent, to sell certain lands for it for $8,000, upon a commission of five per cent of the selling price; (b) that defendant thereafter represented to plaintiff that he could secure for the land only an amount sufficient to net plaintiff $6,650, which would be upon the basis of a total selling price of $7,000; (c) that this representation was false and fraudulent, but was believed by the plaintiff to be true, and, relying upon it, plaintiff agreed to the sale and executed a deed reciting a consideration of $7,000 as the purchase price, and accepted the sum of $6,650 as its share; (d) that in truth and in fact, at the time the representation was made, defendant had already negotiated a sale of the property for $8,000, and thereafter consummated such sale and received the extra $1,000 for his own use and benefit, or to the use and benefit of some other person, and thereby defrauded the plaintiff out of that sum; (e) a demand upon defendant to pay over this $1,000, and his refusal. If

these facts do not state a cause of action, they ought to. It does not require any knowledge of the law to convince one that plaintiff should prevail if these facts are true, and, for the purposes of the motion, they are deemed to be true. Common honesty denies to an agent the right to profit at the expense of his principal by chicane and misrepresentation. If there are any instances wherein the law and justice are out of harmony, this is not one of them, for the courts are of one opinion in declaring that the unfaithful agent under such circumstances shall be made to disgorge the amount of profit so wrongfully realized. (*Hewitt* v. *Young*, 82 Iowa, 224, 47 N. W. 1084; *McNutt* v. *Dix*, 83 Mich. 328, 10 L. R. A. 660, 47 N. W. 212; *Bain* v. *Brown*, 56 N. Y. 285; *Blanchard* v. *Jones*, 101 Ind. 542; *Kerfoot* v. *Hyman*, 52 Ill. 512; *Cutter* v. *Demmon*, 111 Mass. 474; *Denson* v. *Stewart*, 15 La. Ann. 456; *Mulvane* v. *O'Brien*, 58 Kan. 463, 49 Pac. 607; 31 Cyc. 1435, 1436.) This rule is embodied in our Code, in substance, if not in form. Section 5437, Revised Codes, provides: "An authority expressed in general terms however broad, does not authorize an agent: * * * 3. To do any act which a trustee is forbidden to do by Article II, Chapter I of the last title." Section 5375, which deals with the relation of trustee and beneficiary, declares: "A trustee may not use or deal with the trust property for his own benefit, or for any other purpose unconnected with the trust, in any manner." And section 5380 provides: "Every violation of the provisions of the preceding sections of this Article is a fraud against the beneficiary of the trust."

A state of facts very similar to that presented by this complaint was disclosed in *Schoelkopf* v. *Leonard*, 8 Colo. 159, 6 Pac. 209, and the Colorado court held the complaint sufficient. It is not of any consequence that plaintiff unnecessarily avers that the money was paid over by the purchaser through the Great Falls National Bank. So long as it is made to appear that the relationship of principal and agent existed between plaintiff and defendant, good faith required the agent to account to the plaintiff for the entire selling price, less the agreed

commission. The defendant was entitled to $400, and the amount of the judgment should be computed accordingly.

The order of the district court is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

WELCH, APPELLANT, v. DEAN ET AL., RESPONDENTS.

(No. 3,385.)

(Submitted May 26, 1914. Decided June 6, 1914.)

[141 Pac. 548.]

Horticulture — Inspection of Nursery Stock — License Fees — State Horticulturalist---Powers—Interstate Commerce—Regulation by State—Police Power.

Interstate Commerce—Congressional Regulation Exclusive, When.

1. Under section 8, Article I, of the United States Constitution, granting to Congress the power to regulate interstate commerce, to the extent that the subjects of the commercial power are in their nature national or admit of only one uniform system or plan of regulation, congressional legislation alone is demanded, and nonaction by Congress is tantamount to a declaration that they shall remain free from interference by state legislation.

[As to constitutionality of state regulation of interstate commerce, see note in 27 Am. St. Rep. 547; 78 Am. St. Rep. 251.]

Same—Power of States—Police Power.

2. Under the police power reserved to themselves by the states, they may rightfully enforce any reasonable regulation against one engaged in interstate commerce, when he transacts his business in this state, even though such regulation interferes indirectly with such commerce.

Same—Police Regulations—Limit of Power of States.

3. Under the guise of enforcing police regulations, the state may not exact impossible conditions to the right to engage in interstate commerce, or impose burdens which amount directly to a regulation of it.

State Horticulturalist—Powers.

4. The state horticulturalist being a creature of statute, the extent of his authority is measured by the statute.

Same—Certificate of Inspection—Imperative Duty to Furnish.

5. Section 1924, Revised Codes, as amended by Chapter 121, Laws of 1911, imposes upon the state horticulturalist the imperative duty to attach his certificate of inspection to each lot or bill of nursery stock,

if found free from disease or pests, leaving him no discretion to refuse to do so where the shipper omits to take out a license and provide a bond as required by amended sections 1935 and 1936.

[As to state statute requiring preliminary inspection of importations as attempted regulation of interstate commerce, see note in 14 Ann. Cas. 1103.]

Same—Statutes—Conditions Impossible of Performance—Effect.

6. *Held*, that the district court erred in denying mandatory relief to a shipper of nursery stock from another state, commanding the state horticulturalist to attach his certificate of inspection to a shipment inspected by him and found free from disease, since the requirement of section 1935 above, for the payment of a license fee as a condition precedent to doing business in this state, was impossible of performance, the statute not making any provision for procuring the license.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

SUIT by E. S. Welch against M. L. Dean, state horticulturalist, and another. Judgment for defendants, and plaintiff appeals. Reversed.

Messrs. Johnston & Coleman, for Appellant, submitted a brief; *Mr. W. M. Johnston* argued the cause orally.

The bond and license fee required is a burden upon interstate commerce of which Congress has exclusive control. While different state courts hold different views as to the right of states to burden interstate commerce in various ways, the supreme court of the United States has never varied its position in the matter. One of the earliest cases on this point, that of *Brown* v. *Maryland*, 25 U. S. 419, 6 L. Ed. 678, holding that a statute of Maryland requiring every person importing certain commodities into that state to procure a license at a cost of $25 and subjecting them, upon failure to do so, to certain fines and penalties, was void because repugnant to the two provisions of the Constitution (1) forbidding a state to lay any impost or duty on imports or exports, and (2) that Congress shall have the power to regulate commerce with foreign states, among the several states and with the Indian tribes. The case of *American Fertilizer Co.* v. *Board of Agriculture*, 43 Fed. 609, 11 L. R. A. 179, is another good case directly in point. (See, also, *Stoutenberg* v. *Hennick*, 129 U. S. 141, 32 L. Ed. 638, 9 Sup. Ct.

Rep. 256; *Kehrer* v. *Stewart,* 197 U. S. 60, 49 L. Ed. 663, 25 Sup. Ct. Rep. 403; *Lyng* v. *Michigan,* 135 U. S. 161, 34 L. Ed. 150, 10 Sup. Ct. Rep. 725; *Crutcher* v. *Kentucky,* 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. Rep. 851; *Dozier* v. *Alabama,* 218 U. S. 124, 54 L. Ed. 965, 30 Sup. Ct. Rep. 649, 28 L. R. A. (n. s.) 264; *Ames* v. *People,* 25 Colo. 508, 55 Pac. 725; *State* v. *Glasby,* 50 Wash. 598, 21 L. R. A. (n. s.) 797, 97 Pac. 735; *Smith* v. *Farr,* 46 Colo. 364, 104 Pac. 401; *Eaton* v. *People,* 46 Colo. 361, 104 Pac. 407; *Asher* v. *Texas,* 128 U. S. 129, 32 L. Ed. 368, 9 Sup. Ct. Rep. 1; *McCall* v. *California,* 136 U. S. 104.)

Mr. D. M. Kelly, Attorney General, and *Mr. J. H. Alvord,* Assistant Attorney General, for Respondents, submitted a brief.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

For several years last past, E. S. Welch has been engaged in raising nursery stock for sale at Shenandoah, Iowa, where he resides. He has never kept any of his stock in this state, but has transacted a considerable business here by filling mail orders obtained directly from his customers, or from his agents who solicited the orders in this state. All orders were filled by shipping the goods directly from the nursery in Iowa to the customers in Montana. About April 1, 1913, Welch received by mail an order from O. S. Chilcott for a carload of nursery stock, and immediately filled it by shipping the goods to Chilcott. He also notified the state horticulturalist and fruit inspector, in order that the goods might be inspected. R. E. Bancroft inspected the shipment upon its arrival at Billings and found the goods in healthy condition and free from disease, insects or fruit pests, but acting upon the advice of the state horticulturalist, as well as upon his own judgment, declined to issue any certificates of inspection, solely upon the ground that Welch had not obtained a license to engage in the business of selling trees, plants and other nursery stock in this state and had not filed with the state horticulturalist the bond required by the statutes of this state.

Thereupon Welch instituted this suit and sought to restrain the state horticulturalist and Inspector Bancroft from interfering with his business, and, by mandatory injunction, to require them to furnish the proper certificates of inspection. A temporary injunction was issued, but thereafter, upon motion of defendants, it was dissolved, and the plaintiff appealed.

In his complaint plaintiff alleges that he has at all times been ready, able and willing to comply with all the laws of this state with reference to the inspection of nursery stock, and, while this allegation is denied in the answer, it was made to appear, upon the hearing of the motion to dissolve, that the only reason for refusing the certificates of inspection was that plaintiff had not procured a license to sell nursery stock in this state and had not furnished to the state horticulturalist a bond.

The statutes relating to the horticultural industry are found in sections 1917–1947, Revised Codes, with certain amendments made by Chapter 121 of the Laws of 1911. Sections 1935 and 1936, as in the amended Act, read as follows:

"Sec. 1935. No person, firm or corporation shall engage or continue in the business of selling within the state, or importing fruit trees, plants, or nursery stock into the state, without first having obtained a license to do business in this state, as in this Act provided.

"Sec. 1936. Any person, firm or corporation may obtain a license to engage in the business of selling fruit trees, plants or nursery stock in this state, upon the payment of the sum of $25, and by filing with the state horticulturalist a bond, with sureties, in the sum of $1,000, conditioned that the principal will faithfully obey the laws of the state of Montana," *etc.*

Section 1924 provides for the inspection of nursery stock sold or to be delivered in this state, and for certificates of inspection to be attached to the articles constituting the consignment. Sections 1928 and 1934 provide penalties for delivering any such stock without the certificates of inspection; and section 1939 likewise attaches a penalty to the Act of receiving or using such stock without first notifying the inspector and affording him an opportunity to examine and, if necessary, fumigate the same.

Section 8, Article I, of the Constitution of the United States, declares: "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." To the extent that the subjects of the commercial power are in their nature national or [1] admit of only one uniform system or plan of regulation, congressional legislation alone is demanded (*Cooley* v. *Board of Wardens*, 12 How. 299, 13 L. Ed. 996); and, with reference to such subjects, nonaction by the Congress is tantamount to a declaration that they shall remain free and untrammeled from interference by state legislation. (*Western Union Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. Rep. 561.) "When the subject matter is the sale of a well-recognized article of commerce, such as vines, trees, or shrubs, or any other well-known article of commerce, the product of another state, the subject is in its nature national, susceptible of regulation by rules uniform throughout the nation, and obviously susceptible of wise regulation by such uniform national rules only; and in such a case there can, of necessity, be only one system or plan of regulation, and that Congress alone can prescribe." (*In re Schechter* (C. C.), 63 Fed. 695.) The several states have reserved to themselves the police power, and any reasonable regu- [2] lation exercised under that power may be enforced against one engaged in interstate commerce whenever he transacts his business in this state, even though it might interfere indirectly with such commerce. (*Austin* v. *Tennessee*, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. Rep. 132.) But, under the guise of [3] enforcing police regulations, the state may not exact impossible conditions to the right to engage in such business or impose burdens which amount directly to a regulation of it.

In the present instance, the inspector was in error in refusing the plaintiff proper certificates of inspection, for two reasons:

1. The inspector is a creature of statute, and the measure [4, 5] of his authority must be found in the statute. Section 1924 makes it his duty to attach a certificate of inspection to each lot or bill of trees, grafts, plants, scions, *etc.*, if the same be found free from any and all diseases and pests, as designated

by the state board of horticulture. In this he has no discretion to exercise. His duty is imperative. The failure or refusal of plaintiff to take out a license or provide a bond furnished no excuse whatever for the inspector's refusal to grant him proper certificates of inspection. In other words, the failure of plaintiff to obey the law, if such it was, did not justify the inspector in violating it.

2. But the inspector was in error for the stronger reason: The statute above, so far as it relates to a horticulture license, is one [6] of the curiosities of the law. Section 1935 forbids anyone engaging in the business of selling fruit trees or other nursery stock in this state or importing them into this state, even for his own use and to the extent of a single dollar's worth, without having first obtained a license therefor and paid a $25 license fee; and yet the legislature neglected to make any provision whatever for issuing the license. However great the desire of this plaintiff may have been to comply with the mandate of that section, he could not have done so, for no one is authorized to provide the license, to sign it, or to issue it. No one has authority to accept the $25 fee, and there is not even a suggestion as to what disposition is to be made of the fee if collected. It is perfectly apparent that it was not the legislative intention to control this matter by the general license statute (Chapter XIII, Part III, Title XII, Rev. Codes), for that statute deals only with the classes of licenses enumerated therein, and the horticulture license is not one of them.

If the bond mentioned in section 1936 was required as an independent act, serious questions as to the sufficiency and validity of the statute governing it might arise; but apparently it is exacted only as one step in the process of procuring a license, and must stand or fall with the license.

Since there is not any provision of law under which the plaintiff could have procured a license, to require him to have one as a condition precedent to his right to have proper certificates of inspection is tantamount to denying him the right to do business in this state altogether, even though his stock meets all the requirements imposed by law or the regulations of the state

board of horticulture. Under this view it is unnecessary for us at this time to consider the question of constitutional law presented by appellant.

The inspector was without legal excuse for refusing the certificates, and he should have been compelled to discharge the plain duty imposed upon him by section 1924, above. In refusing that relief, the trial court erred, and its order is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

SHAPARD ET AL., RESPONDENTS, *v.* CITY OF MISSOULA ET AL., APPELLANTS.

(No. 3,479.)

(Submitted May 7, 1914. Decided June 8, 1914.)

[141 Pac. 544.]

Cities and Towns—Special Improvement Districts—Statutory Construction—Surplusage—City Council—Jurisdiction—How Acquired.

Municipal Corporations—Special Improvement Districts—Statutes.

1. The provision of subdivision 80, section 3259, Revised Codes, lodging power in city councils to create special improvement districts for the purpose of improving the streets therein, and to charge the abutting property by special assessments for the cost thereof, *held* not to have been repealed by implication by Chapter 89, Laws of 1913.

Statutory Construction—Surplusage.

2. When words or expressions are found in a statute to which no meaning can be assigned consistent with the legislative intent as collected from the entire Act, they must be treated as surplusage and disregarded.

Cities and Towns—Special Improvement Districts—How Created.

3. Under Chapter 89, Laws of 1913, providing the procedure for the creation of special improvement districts, the successive steps to be taken in creating such district are: (1) The passage of a resolution of intention; (2) the publication of the required notice; (3) the hearing and determination of any protests filed, *etc.;* and (4) the ordering of the proposed improvements—the first three being made jurisdictional by section 3 of the Act.

Same—Jurisdiction—When Acquired.

4. Under section 6, Chapter 89, Laws of 1913, it is only after the lapse of fifteen days from the first publication of notice of intention

to create an improvement district and after all protests have been disposed of adversely to objecting property owners, that the city council shall be deemed to have acquired jurisdiction to order the improvement.

Same—Powers—Express and Implied.

5. A municipal corporation can exercise only such powers as are expressly granted or necessarily implied in, or incidental to, the powers expressly granted, or those indispensable to the objects and purposes of the corporation, and any reasonable doubt as to the existence of power to do a particular thing must be resolved against the municipality.

Same—Mode of Exercise of Powers.

6. Where the mode of exercising any power granted to a municipal corporation is pointed out in the statute, that mode must be pursued in all substantial particulars.

Same—Special Improvements—When Proceedings Void.

7. The resolution of intention to create a special improvement district—the basis of the proceeding looking to the creation of the district—together with a notice of its adoption, is a condition precedent, the omission of which is fatal and renders all the subsequent proceedings nugatory.

[As to the propriety of the exercise of power by municipality by resolution, see note in Ann. Cas. 1913C, 1321.]

Same—Jurisdiction—How not Acquired.

8. Where jurisdiction to proceed in the creation of an improvement district has not been acquired by an observance of the antecedent steps prescribed by Chapter 89, Laws of 1913, failure of any property owner to file with the city clerk his written objection to the regularity of the proceedings, within sixty days after the letting of the contract, cannot supply it.

Same—When Proceedings Abortive.

9. Though a mere informality in the resolution of intention to create an improvement district would not have rendered the effort of the city council to acquire jurisdiction nugatory, if the subsequent steps had been pursued in conformity with the statute, the proceeding was abortive where a resolution of intention was deemed sufficient to bring about the creation of the district.

Appeal from District Court, Missoula County; John E. Patterson, Judge.

ACTION by Harry Shapard *et al.* against the City of Missoula *et al.* Judgment for plaintiffs and defendants appeal. Affirmed.

Mr. Frank Woody, for Appellant City of Missoula, and *Mr. Jas. M. Head,* of the bar of Boston, Massachusetts, for Appellant Maguire, each filed a brief, as well as one in reply to that of Respondents, and argued the cause orally.

The supreme court of California in construing laws relating to special improvements similar to the California statutes of 1911, page 730, have held that after the adoption of the resolu-

tion of intention and the hearing, the council must adopt a resolution ordering the work, and these decisions are based on the language used in the first two sentences contained in section 10 of the California law. By the omission of these sentences from the section 8 of the Montana law, it seems clear that the legislature intended to do away with the adoption of a second resolution, and to simply provide for the adoption of the resolution of intention, and for the hearing, and if objections were insufficient, that the city council, without the adoption of any further resolution, could proceed with the improvements. (See 1 Page & Jones on Taxation, secs. 254, 777; *Hughes* v. *Parker,* 148 Ind. 692, 48 N. E. 243; *Stadler* v. *City of Helena,* 46 Mont. 128, 127 Pac. 454; *Lucas* v. *City of San Francisco,* 7 Cal. 463; *Oakland Paving Co.* v. *Rier,* 52 Cal. 270; *Bank of Columbia* v. *Portland,* 41 Or. 1, 67 Pac. 1112; *Spaulding* v. *Baxter,* 25 Ind. App. 485, 58 N. E. 551.) In this particular case the council having adopted a resolution of intention to create the district; having caused the notice of the passage of the resolution of intention to be published, and having heard and denied the objections filed, it acquired jurisdiction, and if, before entering into a contract for making the improvements in this district, it should have adopted a resolution creating a district or ordering the improvements made, this was merely a defect or irregularity, after jurisdiction acquired, and must be taken advantage of by filing the notice provided for in section 13 of the Act in question, and unless a notice which fully complied with the requirements of that section was filed with the city clerk within the time provided therein, this irregularity or defect has been waived by the plaintiffs. (2 Page & Jones on Taxation, secs. 1337, 1026, 1027; *Power* v. *City of Helena,* 43 Mont. 336, 16 Pac. 415; *City of Burlington* v. *Quick,* 47 Iowa, 222; *Buckley* v. *City of Tacoma,* 9 Wash. 253, 37 Pac. 441.)

Mr. Frank A. Roberts, for Respondents, submitted a brief and argued the cause orally.

The city council passed no preliminary resolution of intention whatever, but, on the contrary did adopt Resolution 224–A,

thereby, according to its express terms, "creating special improvement district No. 23." In other words, the city council failed to take the preliminary steps necessary to be taken in order to acquire jurisdiction of the subject matter, and consequently all succeeding steps taken by the council were null and void.

Counsel argues that since the Act itself does not specifically provide for a second resolution, therefore such resolution is not necessary; but if the second resolution is provided for by necessary implication, and as well by the general scheme of making public improvements of this nature, then a second resolution is as essential as if specifically provided for. It is to be noted that the resolution, designated a "resolution of intention," so designated in sections 3, 4, 5, 6 and 7 of Chapter 89, Laws of 1913, in each instance apparently refers to a preliminary resolution to be passed before the creation of the district and ordering of the "contemplated work." In section 7, it specifically recognizes that subsequent resolutions must necessarily be passed, although none are specifically provided for by the Act itself. By section 6 it is provided "immediately thereupon, the city council shall be deemed to have acquired jurisdiction to order the proposed improvements"; that is, shall have acquired jurisdiction to take the necessary legal steps to create the district and order the improvement and let the contract.

The passage of such a preliminary resolution is the usual practice in many states, and the courts in all the states where a "resolution of intention" or, as it is sometimes called, "a resolution of necessity," is made the preliminary step to be taken by council, hold it to be a jurisdictional step, and if omitted then all subsequent Acts futile. (28 Cyc. 978, 1039; *Partridge* v. *Lucas,* 99 Cal. 519, 33 Pac. 1082; *San Jose Imp. Co.* v. *Auzerais,* 106 Cal. 498, 39 Pac. 859; *Pacific Pav. Co.* v. *Verso,* 12 Cal. App. 362, 107 Pac. 590; McQuillin on Municipal Corporations, secs. 1848, 1870, 1875, 1876.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On April 12, 1913, the mayor and city council of the city of Missoula passed a resolution creating special improvement district No. 23 for the improvement of that part of Pattee street extending from the north line of Second street to the south line of the right of way of the Northern Pacific Railway Company, by grading and paving the roadway and constructing necessary curbs, sidewalks, drains, *etc.* The resolution designates the boundaries of the proposed district and describes the general character of the improvement. It excepts from its operation one lot and a portion of another belonging to the United States, and provides that the expense of the improvement in front of this property shall be paid out of the general fund of the city. It further provides that the cost of paving that portion of the roadway occupied by the tracks of the Missoula Street Railway, and to the width of one foot on either side thereof, shall be paid by the railway company. The entire cost to lot owners, after making the deductions referred to above, is estimated to be $63,500 and is to be assessed to the lots in the district in proportion to their area; corner lots, however, to be assessed in double the amount of inside lots. The amount assessed against each lot is to be paid in twenty equal yearly installments, with interest at six per cent. Notice of the passage of the resolution was published for five days in the "Daily Missoulian," a newspaper published in the city, and a copy thereof was mailed to all persons owning lots in the district. The notice described in general terms the character of the improvement, its estimated cost, and designated a time at which the council would hear protests. Thereafter protests filed by certain lot owners with the city clerk within fifteen days after the first publication of notice, having been overruled as insufficient, an ordinance was passed creating a fund to meet the expense of the improvement, setting aside all moneys collected yearly from the assessments and becoming due from the city to pay the amount allotted to it. All warrants issued in payment for the

work, upon its completion, with interest, are to be paid out of this fund. No resolution was thereafter passed creating the district or ordering the improvement to be made. In the meantime, plans and specifications having been prepared by the city engineer, they were approved by the council and the clerk was directed to publish notice inviting sealed proposals from contractors to install the improvement. This was done. Proposals were submitted by several contractors, among them defendant McGuire. When they were opened, that of McGuire was deemed to be the lowest and best bid. Accordingly, the contract was let to him. Thereupon the plaintiffs, the owners of lots subject to assessment, brought this action to enjoin the city and McGuire from executing or carrying out the contract. Upon the filing of the complaint the court issued an injunction *pendente lite.* After a hearing upon the issues made by the pleadings, a decree was entered making the injunction perpetual and awarding plaintiffs their costs. Defendants have appealed.

The plaintiffs assail the validity of the proceedings of the mayor and council in many particulars, and counsel on both sides have filed elaborate briefs submitting many questions for decision. Since it is apparent, however, from the foregoing statement that, in view of the provisions of the statute dealing with the subject of special improvement districts, the proceedings were void from their inception, it will be necessary to discuss but two questions:

1. Has the council of a city power to create special improve-
[1] ment districts for the purpose of improving the streets therein and to charge the abutting property by special assessments for the cost of the improvement? This query is answered by reference to subdivisions 6 and 80 of section 3259 of the Revised Codes, which have been a part of our statute law for many years. The former grants to cities and towns the power "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds, and vacate the same." The latter authorizes them: "To create special improvement districts, des-

ignating the same by number, to extend the time for payment of assessments levied upon such districts for the improvements thereon for a period not exceeding three years; to make such assessments payable in installments and to pay all expenses of whatever character incurred in making such improvements, with special improvement warrants, which warrants shall bear interest at a rate not to exceed six per centum per annum." By subsequent legislation subdivision 80 was amended so that the special assessments might be paid in eight annual installments, with interest on the deferred payments. (Laws 1907, Chap. 75; Laws 1909, Chap. 127.) By the Act of 1913 (Laws 1913, Chap. 89), under which the proceeding in question here was had, the limit was further extended so that the assessments may now be made payable in equal annual installments not exceeding twenty in number, with interest on deferred payments. In none of these provisions is specific reference made to subdivision 80, *supra;* but the result of them has been an amendment of it by necessary implication.

It is argued by counsel for plaintiffs that these provisions were by implication repealed by the Act of 1913, *supra.* The purpose of this Act was to repeal the several sections of the Code providing the mode of creating special improvement districts, which were in many respects inharmonious and incongruous, and to substitute in place of them others free from these defects and providing a simpler and more practicable procedure for improving and beautifying city streets. It is true that section 2 of this Act purports to grant power to effect many improvements none of which are specifically mentioned in section 3259, *supra,* wherein the general legislative powers of cities and towns are enumerated, and that by a general clause in section 35 it repeals all Acts or parts of Acts inconsistent with any of its provisions; yet, as it does not in any way limit or circumscribe these general provisions, it may not be said to be in any sense inconsistent with them, except in so far as subdivision 80, *supra,* has been affected by it and the other legislation referred to as to the time allowed within which to pay assessments. On the contrary, the latter Act is to be construed

as a specific enumeration of the subjects included within the purview of the general grant to which the procedure prescribed by it applies. As above stated, the purpose of the Act was to prescribe the procedure by which special improvement districts may be created, not to grant powers. It cannot be maintained that, in an attempt to do this, the legislature by implication took away the power which it was providing the means to enforce. The words "and create," found in the third line of section 2, which destroy the sense of it, evidently crept into it by inadvertence during the course of its enactment. This is put beyond question when this section is compared with section 2 of Chapter 397 of the statutes and amendments to the Codes of California, enacted in 1911, of which our own statute is in many respects a literal copy. While the general rule of construction requires every word found in a statute to be given force and [2] effect, nevertheless, when words or expressions are found therein to which no meaning can be assigned consistent with the legislative intent as collected from the entire Act, such words and expressions are to be treated as surplusage and wholly disregarded. (*State ex rel. Kehoe* v. *Stromme et al., ante,* p. 25, 139 Pac. 1002; *Paxton & Hershey Irr. Canal etc. Co.* v. *Farmers & Merchants' Irr. etc. Co.,* 45 Neb. 884, 50 Am. St. Rep. 585, 29 L. R. A. 853, 64 N. W. 343; 36 Cyc. 1127.) Eliminating these words, and reading the section in the light of the other provisions of the Act, there is left no room for doubt as to the purpose the legislature intended to accomplish by its enactment.

2. Was the course pursued by the mayor and council in creating the special improvement district in substantial compliance with the provisions of the statute? Section 3 of the Act provides: "Before creating any special improvement district, for the purpose of making any of the improvements * * * authorized by this Act, the city council shall pass a resolution of intention so to do. * * * Upon having passed such resolution, the council must give notice of the passage of such resolution of intention, which notice must be published for five (5) days in a daily newspaper; or in some one issue of a weekly

paper. * * * Such notice must describe the general character of the improvement or improvements so proposed to be made and * * * designate the time when and the place where the council will hear and pass upon all protests that may be made against the making of such improvements or the creation of such district; and said notice shall refer to the resolution on file in the office of the city clerk for the description of the boundaries." Under section 5, at any time within fifteen days after the date of the first publication "of the notice of the passage of the resolution of intention" any owner of property to be assessed for the expense of the improvement may make "written protest against the proposed work or against the extent or creation of the district to be assessed, or both." The protest must be filed with the clerk. At its next regular meeting after the expiration of fifteen days the council must hear and determine the protests. Its determination is conclusive, "provided, however, that when the protest is against the proposed work, and the cost thereof is to be assessed upon the property fronting thereon, and the city council finds that such protest is made by the owners of a majority of the property fronting on the proposed work, or when the protest is against the proposed work, and the cost thereof is to be assessed upon the property within an extended district, and the city council finds that such protest is made by the owners of more than one-half of the area of the property to be assessed for said improvements, no further proceeding shall be taken for a period of six months from the date when said protest was received by the said clerk of the said city council." This protest, however, is not available if the proposed improvement is the construction of a sanitary sewer. In such case the protest may be overruled by a majority of the members of the city council. Section 6 declares: "When no protests have been delivered to the clerk of the city council within fifteen days after the date of the first publication of the notice of the passage of the resolution of intention, or when a protest shall have been found by said city council to be insufficient, or shall have been overruled, or when a protest against the extent of the proposed district shall have

been heard and denied, immediately thereupon, the city council shall be deemed to have acquired jurisdiction to order the proposed improvements."

Under these provisions the successive steps to be taken in [3] creating a special improvement district are: (1) The passage of the resolution of intention; (2) the publication of the required notice; (3) the hearing and determination of protests, when any are filed by property owners whose property is to be assessed for the cost of the work and material necessary to be incurred; and (4) the ordering of the proposed improvement. The first three steps are jurisdictional, for section 3 declares: "Before creating any special improvement district * * * the city council shall pass a resolution of intention so to do." And section 6 declares when jurisdiction has been acquired to order the work to be done; that is, to take the final step resulting in the creation of the district and fixing upon the property included therein, a charge for the amount which the improvement will cost. It is only after the lapse of fifteen days from [4] the publication of notice and after all protests have been disposed of adversely to protesting property owners, that the "city council shall be deemed to have acquired jurisdiction to order the proposed improvements."

The course pursued by the mayor and city council in this case was directly the reverse of that prescribed by the legislature, in that they first created the district and then sought to acquire jurisdiction by taking the several steps which the statute declares to be prerequisite. The rule is well settled in this juris- [5] diction and by the decisions generally that a municipal corporation can exercise no powers except those which are granted in express words or those necessarily implied in or incident to the powers expressly granted, or those indispensable to the objects and purposes of the corporation, and that any reasonable doubt as to the existence of a particular power is to be resolved against the corporation (*Davenport* v. *Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Helena L. & Ry. Co.* v. *City of Helena*, 47 Mont. 18, 130 Pac. 446), and that, when the mode of exercising any power is pointed out in the statute granting it, the

mode thus prescribed must be pursued in all substantial particulars. (*McGillic* v. *Corby*, 37 Mont. 249, 17 L. R. A. 1263, 95 Pac. 1063; *Carlson* v. *City of Helena*, 39 Mont. 82, 17 Ann. Cas. 1233, 102 Pac. 39; see, also, *Bolton* v. *Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881; *San Jose Imp. Co.* v. *Auzerais*, 106 Cal. 498, 39 Pac. 859.) The statute having defined the measure of the power granted, and also the mode by which it is [6] to be exercised, the validity of the action of the legislative body of the municipality must be determined by an answer to the inquiry whether it has departed substantially from the mode prescribed. Particularly is this true when it is engaged in making street improvements, the expense of which is to be a charge by assessment upon the property included in a special improvement district. The power to proceed at all is a restricted and qualified power and may be exercised only upon the terms granted. The law on the subject is well settled, so well, indeed, that no municipal officer should be ignorant of it, or fail to understand that a special improvement district cannot be created without observance of every requirement of the statute on the subject.

The resolution of intention is the primary step to be taken in [7] every instance. It is the basis of the whole proceeding. It, with a notice of its adoption, is a condition precedent; nothing may be substituted in its place, and, though the proceedings may in all other respects conform to the requirements of the statute, the omission of it is fatal and renders all the subsequent proceedings nugatory. (Page & Jones on Taxation, secs. 777, 830; McQuillin on Municipal Corporations, secs. 1848, 1849; 28 Cyc. 978; *San Jose Imp. Co.* v. *Auzerais*, *supra*; *Stadler* v. *City of Helena*, 46 Mont. 128, 127 Pac. 454.) To hold that a resolution, creating a district *in limine*, though notice of it is given, is a compliance with the statute, would be equivalent to a holding that the legislature did not mean what it said, and intended the municipality to wholly disregard the prescribed procedure and proceed by any mode it may deem advisable.

Nor is the proceeding aided in any way by the failure of any property owner to file with the city clerk his written objection

[8] to the regularity of the proceedings, within sixty days after the letting of the contract. The conclusive presumption of waiver, declared in section 13 of the Act is predicated upon the passage of the resolution of intention and the publication of the required notice as a condition precedent; and, though the section may be regarded as having a curative purpose and may accomplish this purpose so far as regards other irregularities in the proceedings, it cannot supply jurisdiction when it has not been acquired by observance of the antecedent steps necessary to acquire it. (Page & Jones on Taxation, sec. 981; *Comstock* v. *City of Eagle Grove,* 133 Iowa, 589, 111 N. W. 51; *Smith* v. *City of Buffalo,* 159 N. Y. 427, 54 N. E. 62.)

It is argued by counsel for the defendants that, though the resolution passed by the mayor and council is in form a resolution creating the district, it is in effect a resolution of intention, [9] and should be so construed. If it appeared that the mayor and council had intended it to operate as such, and this intention had been manifested by the passage of a subsequent resolution creating the district or ordering the proposed improvement to be installed, a wholly different situation would be presented. A mere informality in the resolution ought not to render the effort to acquire jurisdiction nugatory, and doubtless would not, if the subsequent proceedings in pursuance of it were in conformity with the statute. But this is not such a case, as is made clear by the fact that the resolution in question was regarded from the beginning as the only step necessary to be taken by way of legislative utterance to create the district. The defendant city has adopted the commission form of government authorized by Chapter 57 of the Laws of 1911. Under section 23 of that Chapter, an ordinance or resolution enacted as therein directed was an indispensable part of the proceedings.

Some argument is made by counsel for defendants that the views expressed above are not in harmony with the conclusion announced in *Stadler* v. *City of Helena,* 46 Mont. 128, 127 Pac. 454, and *Ford* v. *City of Great Falls,* 46 Mont. 292, 127 Pac. 1004. In reply to this argument, it is sufficient to say that the

question presented here was not raised or considered in either of these cases.

The record discloses many irregularities in the proceedings by the mayor and council. We do not deem it necessary to notice them, because they are not likely to intervene in the new proceeding which must be instituted, if the proposed improvement is ever installed.

The decree is affirmed. *Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

PITTSMONT COPPER CO., APPELLANT, *v.* O'ROURKE, SHERIFF, ET AL., RESPONDENTS.

(No. 3,384.)

(Submitted May 6, 1914. Decided June 8, 1914.)

[141 Pac. 849.]

Equity—Execution—Injunction—Corporations—Reorganization—Fraud in Law—Parties—Counterclaim—"Subject of Action"—Pleading—Surplusage.

Equity—Counterclaim—Pleading—Sufficiency.

1. In a suit in equity, affirmative matter pleaded as a counterclaim, if sufficient in substance to warrant denial of relief to the plaintiff or to require the imposition of conditions to the granting of the same, will, though defective in form, support a decree.

[As to setoff, recoupment and counterclaim as distinguished from each other, see note in Ann. Cas. 1914B, 119. As to the law governing right of setoff, see note in 4 Ann. Cas. 88.]

Corporations—Creditors—Definition.

2. An employee of a mining company became its creditor on the day on which a cause of action for personal injuries accrued in his favor.

Same—Nonconsenting Creditors—Pleading—Sufficiency.

3. An allegation that an employee who had secured a judgment for personal injuries against a mining company had no knowledge of the proceedings leading up to an alleged fraudulent sale of its property and did not assent to them, *held* a sufficient statement that he was a nonconsenting creditor.

Same—Reorganization—Fraud in Law.

4. Where a mining corporation, which was largely indebted, agreed that the holder of its bonds should, upon default, buy in the corporate property for a sum much less than its actual value in consideration of giving certain of its creditors stock in the reorganized company and

issuing to the stockholders shares in the latter, the agreement was fraudulent in law as against a nonconsenting creditor, and ineffective to bar his resort to the property in satisfaction of his judgment.

Equity—Equitable Defense—Pleading.

5. In a suit in equity, the mere pleading of an equitable defense, as such, will authorize the granting of whatever affirmative relief the pleader shows himself entitled to, consistent with his pleadings and without regard to his prayer.

Counterclaim—"Subject of Action"—Definition.

6. The words "subject of the action" found in section 6541, Revised Codes, providing *inter alia* that any cause of action in favor of the defendant and against the plaintiff which is connected with the subject of the action may be pleaded as a counterclaim, must be understood to refer to the origin and ground of plaintiff's right to obtain the relief asked, rather than to the thing itself about which the controversy has arisen.

Corporations—Reorganization—Fraud—Parties.

7. A corporation, against which defendant had a claim for personal injuries, entered into a reorganization agreement with the plaintiff corporation, which was the holder of its bonds, the agreement providing that, upon foreclosure of the mortgage to secure the bonds, the property of the original company should be bought in by plaintiff, and that stock in the latter should be issued to the shareholders in the original company. Thereafter defendant recovered a judgment against the original company and attempted to sell, under execution, land which had been owned by it. *Held*, in a suit for an injunction, that a demurrer to defendant's answer alleging a defect of parties, was properly overruled in that defendant was not required to make the old company nor its stockholders, creditors and officers who secured the consent of each corporation to the reorganization, parties, the presence of the plaintiff corporation being sufficient for a complete adjudication of the issues.

Same—Plan of Reorganization—Fraud—Evidence—Sufficiency.

8. Evidence *held* to show that the steps leading up to plaintiff company's acquisition of all the property of the original corporation against which defendant held a judgment for personal injuries, enforcement of which by execution plaintiff sought to enjoin, were had in pursuance of a plan or scheme of reorganization in fraud of the judgment creditor's rights.

Same—Reorganization—Nonconsenting Creditors—Fraud.

9. Proceedings looking to the foreclosure of a mortgage on corporate property, under an agreement by which stockholders of the company, who had assented to a plan of reorganization, should participate in the distribution of shares in the new company, were in fraud of the rights of a nonconsenting creditor.

Same—Fraud—Purchasers for Value.

10. Neither the creditors who participated in the agreement for the reorganization of the old company and accepted stock in the new one in consideration of their claims, nor the new corporation were in the position of innocent purchasers for value, under the circumstances detailed in paragraph 7, *supra*, as against a nonconsenting creditor.

Fraud—Fraud in Law—Pleading and Proof.

11. Charges of actual fraud cannot be established by proof of fraud in law.

Same—Pleading—Surplusage.

12. Where the answer, in a suit to enjoin an execution sale, alleged facts showing that the purchase by plaintiff of property of the judg-

ment debtor was fraudulent in law, allegations that the purchase was fraudulent in fact, which were not supported by the evidence, were properly disregarded as surplusage.

Corporations—Reorganization—Execution—Restraining Sale—Parties.

13. The plaintiff (reorganized) corporation having been the real mortgagee in the mortgage given by the old company to secure its bonds, the trust company—as the nominal mortgagee and *alter ego* of the plaintiff itself—had no interest in the property independently of the persons for whom it held it in trust (the creditors and stockholders of plaintiff), and was therefore not a necessary party to a suit to enjoin an execution sale under a judgment obtained by defendant against the old company, who, in an answer seeking affirmative relief, attacked the validity of the transaction as fraudulent.

Appeal from District Court, Silver Bow County; J. Miller Smith, a Judge of the First Judicial District, presiding.

ACTION by the Pittsmont Copper Company, a corporation, against John K. O'Rourke, as sheriff of Silver Bow county, and another. From an order granting defendants a new trial, plaintiff appeals. Affirmed.

Messrs. Kremer, Sanders & Kremer, for Appellant, submitted a brief and one in reply to that of Respondents; *Mr. Louis P. Sanders* argued the cause orally.

The affirmative allegations do not constitute a counterclaim. As between Forsell and the appellant, there is lacking the essential element of privity, and privity between the parties must be shown to authorize the court to entertain a counterclaim. Likewise, there must be mutuality between the parties, and the allegations in question affirmatively disclose absence of this ingredient, which must be shown to exist if a party is successfully to maintain a counterclaim. (*Loewenberg* v. *Rosenthal,* 18 Or. 178, 22 Pac. 601; *Van Arsdale* v. *Edwards,* 24 Okl. 41, 101 Pac. 1123, 1125.) Plaintiff's action is to enjoin a wrongful sale. The claim of the respondent Forsell is based upon a simple money judgment and seeks to secure its satisfaction. It is an action upon a debt. It cannot be counterclaimed as against the plaintiff's cause of action, as this court has pointed out in *Potter* v. *Lohse,* 31 Mont. 91, 77 Pac. 419.

A fundamental rule of equity jurisprudence is that where a bill is filed to affect a fund or property in which different per-

sons have an interest, all the persons interested therein must be made parties. (*Oliver's Exrs.* v. *Palmer,* 11 Gill & J. (Md.) 426, 449; *Wenger* v. *Chicago & E. R. Co.,* 114 Fed. 34, 51 C. C. A. 660; *Le Duc* v. *Brandt,* 110 N. C. 289, 14 S. E. 778.) This so-called counterclaim, when analyzed, is simply a fatally defective endeavor to bring an action in the nature of a creditor's suit, under the guise of a counterclaim, to set aside as fraudulent the transfer of the properties of the Pittsburgh and Montana Copper Company to appellant through the medium of foreclosure proceedings. The essential allegations of the ordinary creditor's suit to set aside a fraudulent transfer must appear in any proceeding that Forsell may attempt to maintain here or that he may in any other proceeding seek to enforce; and the same rules as to parties apply. The assignor is an indispensable party to such a suit, the party by whom the property was conveyed. (*First Nat. Bank* v. *Shuler,* 153 N. Y. 163, 60 Am. St. Rep. 601, 47 N. E. 262; *Le Duc* v. *Brandt,* 110 N. C. 289, 14 S. E. 778; *Bixler* v. *Fry,* 157 Mich. 314, 122 N. W. 119; *Talbott* v. *Leatherbury,* 92 Md. 166, 48 Atl. 733; *Carnahan* v. *Ashworth* (Va.), 31 S. E. 65; *Bevins* v. *Eisman,* 21 Ky. Law Rep. 1772, 56 S. W. 410; *First Nat. Bank* v. *Gibson,* 69 Neb. 21, 94 N. W. 965.) The Pittsburgh and Montana Copper Company—the judgment debtor—is a necessary party. (*Hammond* v. *Hudson River Iron etc. Co.,* 20 Barb. (N. Y.) 378; *Lovejoy* v. *Irelan,* 17 Md. 525, 79 Am. Dec. 667.) "To a bill to vacate a decree the plaintiff in such decree is a necessary party. The want of him as a party is a fatal defect." (*Harwood* v. *Cincinnati etc. R. R. Co.,* 17 Wall. (U. S.) 78, 21 L. Ed. 558; *Ribon* v. *Chicago etc. R. R. Co.,* 16 Wall. (U. S.) 446, 21 L. Ed. 367; 3 Thompson on Corporations, sec. 3310.)

The decree entered in the court of common pleas of Allegheny county of Pennsylvania cannot be collaterally attacked and held for naught in this proceeding. It can only be called into question by Forsell—a creditor of the Pittsburgh and Montana Copper Company, on the ground of fraud in a direct proceeding instituted in a court of competent jurisdiction where all necessary parties are before the court. (*Lee* v. *Figg,* 37 Cal. 328, 99

Am. Dec. 271; *Hodgdon* v. *Southern Pac. R. Co.*, 75 Cal. 642, 17 Pac. 928; *Guggenheim* v. *Wahl*, 138 App. Div. 269, 122 N. Y. Supp. 941; *Hunt* v. *Loucks*, 38 Cal. 372, 99 Am. Dec. 404; *Tilton* v. *Cofield*, 93 U. S. 163, 23 L. Ed. 858.)

Of course, any impairment of the security afforded under the conveyance in question affects the right and interest of the trustee. It is not charged with fraud. If it were, it would be a necessary party. (*Farmers' Loan etc. Co.* v. *Louisville etc. R. Co.*, 103 Fed. 110.) Though not charged with fraud, it is just as essentially a party, for it is admitted it has a valid lien, in no way attached to the property, which is superior to the claimed lien of Forsell's judgment. (*Theriot* v. *Daigle*, 125 La. 363, 51 South. 292; *Thornton* v. *Gaar*, 87 Va. 315, 12 S. E. 753; *Whitman* v. *Union Surety Co.*, 110 Md. 421, 72 Atl. 1042.) It is a general rule of equity that all persons materially interested, either legally or beneficially, in the subject matter of the suit should be made parties thereto, either as plaintiffs or defendants, so that there shall be a decree that shall bind them all and that full justice be done to all in the one suit. (3 Thompson on Corporations, sec. 3310; *Norris* v. *Bean*, 17 W. Va. 655; *United States* v. *Howland*, 4 Wheat. (U. S.) 108, 4 L. Ed. 526; *Wilson* v. *City Bank*, 3 Sum. 422, Fed. Cas. No. 17,797.) "Where a bill is filed in aid of a cause of action against a judgment debtor, all persons claiming any interest in the subject matter are necessary parties." (*Gavazzi* v. *Dryfoos*, 47 Misc. Rep. 15, 95 N. Y. Supp. 199.)

It is not the law that, baldly, the assets of a corporation constitute a trust fund for the payment of creditors' claims. The supreme court of the United States, before the *Boyd Case* was presented to any federal court for determination, had defined precisely what the trust fund doctrine is. After much confusion of ideas as to its real meaning and much conflict of decision in its application, that court finally defined the trust fund doctrine and courts generally have adopted that theory as announced in the leading case of *Hollins* v. *Brierfield Coal etc. Co.*, 150 U. S. 371, 37 L. Ed. 1113, 14 Sup. Ct. Rep. 127. "The expression that the property of a corporation

constitutes a 'trust fund' for its creditors only means that when the corporation is insolvent and a court of equity has taken possession of its assets for administration, such assets must be appropriated to the payment of its debts before distribution to its stockholders, but, as between the corporation itself and its creditors, the corporation does not hold its property in trust or subject to a lien in favor of its creditors in any other sense than does an individual debtor. (*First Nat. Bank* v. *Dovetail Body etc. Co.*, 143 Ind. 550, 52 Am. St. Rep. 435, 40 N. E. 810; *O'Bear Jewelry Co.* v. *Volfer*, 106 Ala. 205, 54 Am. St. Rep. 31, 28 L. R. A. 707, 17 South. 525.) Wisconsin holds, in line with the modern principle of trust funds, that "mere insolvency of a corporation does not convert its property into a trust fund so as to prevent preference." (*Ford* v. *Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.)

Actual, deliberate and designed fraudulent transactions were relied on by Forsell. He failed to establish that which he set forth. It is elemental that if a party, though needlessly, describe or set forth a cause of action, and the means adopted in effecting it, with minuteness and particularity, and the proof substantially vary therefrom, there is a fatal variance. (*Forsell* v. *Pittsburgh etc. Copper Co.*, 38 Mont. 403, 100 Pac. 218.) Fraud in fact being charged must be proved as alleged. (*Means* v. *Flanagan*, 79 Ill. App. 296.) "When relief is sought on the ground of fraud, it must be clearly proved as alleged and is not lightly to be inferred." (*Bumpus* v. *Bumpus*, 59 Mich. 95, 26 N. W. 410; *Hutchinson* v. *Royer*, 78 Mich. 337, 44 N. W. 327; *Webb* v. *Darby*, 94 Mo. 621, 7 S. W. 577; *Columbia Sav. Bank* v. *Kingsburry*, 84 Mo. App. 82; *Deepwater Council* v. *Renick*, 59 W. Va. 343, 53 S. E. 552; *Finch* v. *Kent*, 24 Mont. 268, 61 Pac. 653.)

It is the law that plans of reorganization are to be construed in accordance with the same rules which govern in the construction of any other contract. The intention of the parties is to be ascertained and given effect. (2 Clark & Marshall on Corporations, sec. 345d; *Wiggins Ferry Co.* v. *Ohio etc. R. Co.*, 142 U. S. 396, 12 Sup. Ct. Rep. 188, 35 L. Ed. 1055.) Mere proof

of an act is not evidence of a fraudulent purpose. (*Swing* v. *Empire Lumber Co.*, 105 Minn. 356, 117 N. W. 467.) In so far as the evidence in this case goes, the foreclosure proceedings were, in themselves, free from taint of fraud, and were brought upon a valid claim of indebtedness without connivance on the part of mortgagor, trustee or purchaser. The purchaser acquired the same perfect title that it would have purchased had there been no plan conceived to prevent foreclosure as against the Pittsburgh and Montana Copper Company. This title cannot be held to be impressed with any constructive trust in favor of Forsell, and if this be true, the purchaser cannot in any other way be held liable or penalized to pay the judgment Forsell held against the Pittsburgh and Montana Copper Company. (*Hukle* v. *Atchison etc. Ry. Co.*, 71 Kan. 251, 6 Ann. Cas. 83, 80 Pac. 603; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629, 24 Sup. Ct. Rep. 399; *Columbus S. & H. R. Co. Appeals*, 109 Fed. 177, 48 C. C. A. 275; *Goldmark* v. *Magnolia Metal Co.*, 44 App. Div. 35, 60 N. Y. Supp. 425; *Paton* v. *Northern Pac. R. Co.*, 85 Fed. 838.) With foreclosure proceedings not consummated as part of any prior arrangement, fully terminated with entry of decree, sale effected and trustee's deeds executed and delivered and filed for record September 20, 1909, we find Forsell with a judgment docketed October 30, following. There is neither evidence nor law to sustain an argument that the lien of this judgment, under such circumstances, followed the property into the hands of the purchaser. To so hold would be to read into the record evidence that is not there. If plaintiff bought a valid title unaffected by Forsell's claimed lien, then it cannot by indirection be compelled to satisfy the judgment out of its funds or otherwise. (*Winter* v. *Iowa Central Ry. Co.*, 111 Iowa, 342, 82 N. W. 760; *Hale* v. *Burlington etc. R. Co.*, 13 Fed. 203, 2 McCrary, 558; *Chicago & O. R. R. Co.* v. *McCammon*, 61 Fed. 772, 10 C. C. A. 50.)

Messrs. Maury, Templeman & Davies, Mr. Peter Breen and *Mr. H. K. Jones* submitted a brief; *Mr. Templeman* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Suit in equity by the Pittsmont Copper Company (hereinafter called the plaintiff) against John K. O'Rourke, as sheriff of Silver Bow county, and one Alfred Forsell, to enjoin the sale of certain real property consisting of mines in operation, smelting and concentrating plants and other appurtenances thereto, in execution of a judgment obtained by Forsell against the Pittsburgh and Montana Copper Company (hereinafter called the Montana company), to have said judgment declared not to be a lien upon such property, and to have the levy of execution thereunder declared null and void. The complaint was filed February 10, 1911, and its material allegations are: That the plaintiff is a West Virginia corporation and the owner of the property in question; that on October 30, 1909, Alfred Forsell obtained a judgment for $18,000 damages against the Montana company for personal injuries; that on January 21, 1911, he caused execution upon said judgment to issue commanding O'Rourke, as sheriff, to levy upon and sell all the right, title and interest which the Montana company had in the property on the date of the judgment; that O'Rourke has levied upon and advertised said property for sale, and, unless restrained, will sell the same under said execution, in compliance with the precept and instructions of Forsell; that on October 30, 1909, the Montana company had no right, title or interest in the property or any part thereof, but that the plaintiff then was, and for some time prior thereto had been and still is, the record owner of said property and seised in fee thereof: that the sale thereof under said execution will create a cloud upon the title of the plaintiff, to its great and irreparable injury.

Separate answers were filed. The answer of O'Rourke practically admits all the allegations of the complaint except those relating to ownership and possession of the premises sought to be sold. That of Forsell consists of two parts, *viz.:* The joinder of issue and a further answer which is also denominated a counterclaim. The joinder of issue is substantially the same as in the answer of O'Rourke, coupled with an admission "that

plaintiff claims the present ownership and possession of said premises." The further answer is quite elaborate; but its substance is that on January 16, 1907, Forsell sustained personal injuries through the negligence of the Montana company, a corporation then owning and operating certain mining and smelting properties in the city of Butte; that for these injuries he brought his action on September 10, 1907, and on October 30, 1909, recovered judgment for $18,000 and costs; that he is still the owner of said judgment, which has not been appealed from nor paid; that executions have been issued and returned *nulla bona*, and that the Montana company has no property or assets standing in its own name, but that the assets and properties now standing in the name of the corporation plaintiff, including the property described in the complaint, are "in right and law subject to the claim" of Forsell against the Montana company for the following reasons: On June 1, 1906, the Montana company, for the purpose of securing an issue of bonds amounting to $3,000,000 face value, executed and delivered a mortgage upon all its property, including the property described in the complaint, to the Union Trust Company of Pittsburg, as trustee, and of the bonds so secured $2,216,000 face value were issued. On June 1, 1909, the plaintiff had acquired all the bonds so issued, and the Montana company, which up to that time had fully complied with all the terms of said mortgage, defaulted therein by failing to pay the interest then due upon the said bonds as well as that portion of the principal which then matured, whereupon the plaintiff caused proceedings to be instituted on the 8th day of July, 1909, for the foreclosure of said mortgage, and on August 24, 1909, at the sale under such foreclosure became the purchaser of all the property of the Montana company, then reasonably worth $6,000,000, for the sum of $5,000. It is specifically alleged that the acquisition of the bonds of the Montana company by the plaintiff, the default in the payment thereof by the Montana company, the foreclosure of the mortgage, and the plaintiff's purchase thereunder of all the property of the Montana company occurred pursuant to a plan or scheme for the reorganization of the affairs of the

Montana company, with the consent of all its creditors except Forsell, and under an agreement with its stockholders that they might without further cost exchange their shares of stock in the Montana company for shares of stock in the corporation plaintiff; that the foreclosure and sale thereunder were not intended by the Montana company, or by the plaintiff, or by any of the officers or stockholders of either corporation, to bar or preclude the stockholders of the Montana company from participating and sharing in the properties so acquired by the plaintiff, but that the stockholders of the Montana company did share and participate in such property by the exchange, without further cost, of their stock in the Montana company for stock in the corporation plaintiff; that the value of the stock of the plaintiff so acquired by the stockholders of the Montana company was greatly in excess of the full face value of Forsell's judgment with accrued interest; that he was not a party to any of these transactions and knew nothing thereof, but that they had been consummated at the time he obtained his judgment and with a view to escaping the liability of the Montana company toward him; that the object and effect of said transactions was to enable the stockholders of the Montana company to retain an interest in its properties so acquired by the plaintiff but excluding Forsell, as claimant and creditor, from securing the payment of his claim, and that they were fraudulent and void as to him. The answer concludes with a prayer asking for various affirmative remedies and also for general relief.

A demurrer to the separate answer of Forsell was interposed and overruled. The plaintiff then replied, setting forth its version of the circumstances under which it acquired the property of the Montana company, denying that such acquisition or the transactions leading up to it were in pursuance of any plan or scheme of reorganization, or that there was any fraud therein, or that the purpose or effect thereof was to permit the stockholders of the Montana company to retain an interest or participate in the property so acquired; and it was specifically alleged that the foreclosure occurred solely because of the inability of said company to pay the interest due on June 1, 1909,

upon its bonds, and that at the sale thereunder the plaintiff was the highest and best bidder for the property and paying full value therefor, to-wit, in excess of $2,216,000.

Upon the trial, which was to the court sitting without a jury, the plaintiff presented a formal objection to the introduction of any evidence under the affirmative allegations of Forsell's answer, which was overruled; later, and at the close of the evidence on the part of defendants, plaintiff moved "to dismiss the alleged cause of action set up in the affirmative matter" of Forsell's answer, and this met a similar fate. Findings and conclusion of law were made and filed, and upon them a decree was entered granting to plaintiff all the relief demanded in its complaint, besides forbidding the defendants from asserting any right, title or interest in or to the property in question, or any thereof. In due course defendants presented their motion for new trial, which was granted; and this appeal is by the plaintiff from the order granting a new trial.

Four errors are assigned, which impugn the order appealed from on two grounds: (a) That Forsell's "further answer and counterclaim" had no place in the suit; and (b) that the evidence does not authorize the defendants to prevail or the plaintiff to be denied the relief asked for by it.

(a) The entire argument on the part of plaintiff, so far as the [1] question of pleading is concerned, proceeds upon the theory that the affirmative matter set forth in the answer and pleaded as a counterclaim is defective as to both substance and parties. We do not deem it of importance to ascertain whether the "further answer" states a counterclaim, strictly so called, with all the precision requisite in an action at law. The present proceeding is in equity, and the matter set forth in the "further answer" cannot be ignored if it is sufficient in substance to warrant denial of relief to the plaintiff or to require the imposition of conditions to the granting of the same. (*Davis* v. *Davis*, 9 Mont. 267, 275, 23 Pac. 715; *Anaconda C. M. Co.* v. *Thomas*, 48 Mont. 222, 137 Pac. 380; Bliss on Code Pleading, secs. 383, 390.) Whether the matter so pleaded was sufficient for these purposes, or either of them, was the real question

before the court upon the demurrer to the answer, as well as upon the objection to the introduction of any evidence thereunder. There cannot be the slightest doubt that it was correctly decided, if the facts alleged support the ultimate theory upon which the answer proceeds, *viz.*, that the plaintiff came into the property under such circumstances as to render it answerable to the claim of Forsell, a nonconsenting creditor. The [2] suggestion was made on oral argument that Forsell was not a creditor within the meaning of the rule invoked by him, because his judgment had not been entered when the transfer occurred. There is nothing in this. He became a creditor of the Montana company when, in January, 1907, his cause of action accrued (Rev. Codes, secs. 6222, 6223; 20 Cyc. 421; 14 Am. & Eng. Ency. of Law, 251; *Chalmers* v. *Sheehy*, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709); the judgment served to [3] judicially establish that pre-existing fact and to put him into position to assert his right; and, as it is also alleged that he had no knowledge of the proceedings leading up to the sale and did not assent to them, it must be taken as sufficiently pleaded that he was a nonconsenting creditor.

Passing, then, to the allegations of fact, it will suffice here to [4] recall the following: That, prior to the default of the Montana company in the payment of its bonds, these bonds had all come into the hands of plaintiff; that the plaintiff caused the foreclosure of the mortgage given to secure the bonds; that the foreclosure and plaintiff's purchase thereunder occurred pursuant to a plan for the reorganization of the affairs of the Montana company; that such plan was entered into by the plaintiff with the consent of the stockholders of the Montana company and all its creditors except Forsell; that it was a part of such plan to allow the stockholders of the Montana company to exchange their shares in that company for shares of plaintiff's stock; that this plan was carried out, and as a result of it the shareholders were permitted to retain, and did retain, an interest in the property acquired by the plaintiff, of a value greatly in excess of Forsell's claim. Such a transaction constitutes a fraud in law, so far as the nonconsenting creditor is

concerned, and is ineffective to bar his resort to the property in satisfaction of his demand. (*Northern Pac. Ry. Co.* v. *Boyd,* 228 U. S. 482, 57 L. Ed. 931, 33 Sup. Ct. Rep. 554; *San Francisco & Northern Pac. R. R. Co.* v. *Bee,* 48 Cal. 398; *Grenell* v. *Detroit Gas Co.,* 112 Mich. 70, 70 N. W. 413; *Loughlin* v. *United States School Furniture Co.,* 118 Ill. App. 36.)

The answer states an equitable defense; but, unless there is a defect of parties, it has other and larger consequences. In a suit in equity the mere pleading of an equitable defense, as [5] such, will authorize the granting of whatever affirmative relief the party shows himself entitled to, consistent with his pleadings and without regard to his prayer. This is under the rule that when a court of equity has before it all the parties to any difference, and when it has obtained complete jurisdiction of the subject matter, it will finally settle the whole controversy. (*Davis* v. *Davis, supra; Kleinschmidt* v. *Steele,* 15 Mont. 181, 188, 38 Pac. 827; *Anaconda C. M. Co.* v. *Thomas, supra.*) Again, under the statute (Rev. Codes, sec. 6541), any cause of action in favor of the defendant against the plaintiff, or against the person whom the plaintiff represents, which tends to defeat the plaintiff's recovery, and which is connected with the subject of the action, may be pleaded as a counterclaim. [6] The words "subject of the action" have been the object of much refinement of discussion, but it has long been settled in this state that they ought to be understood, "not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and ground of the plaintiff's right to recover or obtain the relief asked." (*Collier* v. *Ervin,* 3 Mont. 142; *Potter* v. *Lohse,* 31 Mont. 91, 97, 77 Pac. 419.) Under this rule, it is quite clear that the subject of plaintiff's action is its right, as owner, to enjoy the property in question, free from the levy complained of, free from the threatened sale, and free from any claim on the part of Forsell by virtue of his judgment against the Montana company; and that the ground of Forsell's claim to affirmative relief is his alleged right to make the same levy and sale in execution of the same judgment. Between them there is an inseparable connection. This court has

said that: "Under the rules of practice in a court of equity, the court will hear an equitable defense or counterclaim, connected with the subject matter of the petition, without regard to the provisions of the Code of Civil Procedure above cited." (*Davis* v. *Davis, supra.*) And the supreme court of the United States declares that: "Where, in a court of equity, an apparent legal burden on property is challenged, the court has jurisdiction of a cross-bill to enforce, by its own procedure, such burden." (*Chicago etc. Ry. Co.* v. *Third Nat. Bank,* 134 U. S. 276, 33 L. Ed. 900, 10 Sup. Ct. Rep. 550.)

There remains the question of parties. The demurrer and the [7] objection asserted that the Montana company, the Union Trust Company of Pittsburg, the stockholders of the Montana company, the creditors of the Montana company other than Forsell, and the officers who secured the consent of each corporation to the reorganization are all necessary parties. Except as to the Union Trust Company and the Montana company, there is not even plausibility in this contention. It is the effect of the reorganization, and not the reorganization itself, that is the subject of assault. The defendants are endeavoring to reach property, not to fix any personal liability. It is not the theory of the answer nor an indispensable condition to the award of affirmative relief thereunder that the plaintiff's acquisition of the property is void at large or that the transactions leading up to it are subject to attack from every quarter; but that the plaintiff took the property with an equitable charge upon it, to-wit, Forsell's claim since reduced to judgment. It certainly does not appear from the answer that the presence of any party, save the plaintiff, is necessary for a complete adjudication of the issues thus presented. The Union Trust Company of Pittsburg, for instance, was the nominal mortgagee in the mortgage which is foreclosed, but the bonds to secure which the mortgage was given, belonged to the plaintiff, so that it was the real mortgagee; and, when the foreclosure occurred at its direction, the trust company was a mere instrument—an *alter ego*—of the plaintiff itself. So, too, the supposition that the Montana company is a necessary party proceeds upon a mis-

taken apprehension. As between the two corporations, the proceedings were legal and operated to devest the Montana company of any interest in the property. The interest which it may be said to possess for the purposes of this case is a creation of equity, to aid the excluded creditor in his remedy, but capable of altering the situation of the Montana company in no respect whatever. If the basis of Forsell's claim to affirmative relief were an open, unliquidated demand subject to adjudication as a liability of the Montana company, or if the defendants' object were to set aside the entire transaction as void at large, a different situation would be presented. We are satisfied that the court had before it all the parties needful to a proper adjudication of the cause as presented by the "further answer and counterclaim." (*Blanc* v. *Paymaster Min. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; *Homestead Min. Co.* v. *Reynolds*, 30 Colo. 330, 70 Pac. 422; *Schneider* v. *Patton*, 175 Mo. 684, 75 S. W. 155.)

(b) We premise our discussion of the case upon the evidence [8] by remarking that the trial court made findings in substantial accord with the complaint and reply, specifically negativing the allegations of Forsell to the effect that the acquisition of the property of the Montana company by the plaintiff and the proceedings leading up to the same were in pursuance of a plan or scheme of reorganization; that in consequence of such proceedings the stockholders of that company participated or retained any interest in the property so acquired; and that such acquisition of such property was in fraud of the rights of Forsell. Whether the motion for new trial was granted because the court became dissatisfied with the findings, or because it was thought that they did not support the decree as entered, we are unable to tell. At any rate, it is the facts which control, and these we shall state as we deem them established by the evidence, following the findings where we may, and our own deductions where the findings are silent or in our opinion erroneous.

The Montana company was incorporated under the laws of West Virginia in July, 1902, for the purpose of mining and

smelting in Montana; its capitalization, originally $5,000,000, was increased in the same year to $30,000,000, divided into 300,000 shares of the par value of $100 each. Of this, $380,000 was paid in in cash, and the balance, $29,620,000, was issued in exchange for mining properties, including the property affected by this suit, and these properties the company thereafter operated in its own name until July 8, 1909. The plaintiff company was incorporated under the laws of West Virginia on April 21, 1906, as the Pittsburg & Western Copper Company, for the purpose of mining and smelting in Montana; its capitalization was $1,000, divided into 100 shares of the par value of $10 each; but 20 shares were issued to 5 persons, *viz.*, John G. Evans, J. R. Shaughnessy, F. K. Martin, J. A. Lager, and R. T. Rossell, who constituted its entire stockholding body; it possessed no property and conducted no business until the events hereinafter set forth. In the operations of the Montana company from its organization to June 1, 1906, a large amount of indebtedness was incurred, and on that day it authorized an issue of bonds to the amount of $3,000,000, none of which, however, were sold, but they were to the amount of $2,216,000 issued to certain creditors as collateral to demand notes; to secure the payment of these bonds the company executed its trust deed or mortgage to the Union Trust Company of Pittsburg, as trustee. On January 16, 1907, Forsell was injured as the result of negligence of the Montana company, and on September 10, 1907, he commenced his action against it for damages; but this action did not ripen into judgment until October 30, 1909. On October 20, 1907, the plaintiff's name was changed to its present style, Pittsmont Copper Company.

In the meantime, as the result of the panic of 1907, the Montana company became financially embarrrassed, and three persons, to-wit, J. W. Friend, D. C. Noble, and Hay Walker, Jr., appear upon the scene as a creditors' committee, considering its affairs. How the committee came into being, and when their activities began, are not revealed; but on December 2, 1907, we find them proposing a plan of reorganization, so designated by the committee, the salient features of which were: To procure

a charter for a new company; the new company to acquire all the first mortgage bonds, all the shares of stock, and all the notes and other obligations of the Montana company, the holders of which might assent; the new company to authorize bonds to the amount of $2,500,000, preferred stock $1,000,000, common stock $10,000,000, and to dispose of the same as follows: (a) The creditors of the Montana company surrendering the indebtedness held by them, together with the bonds of that company held as collateral security, to receive notes of the new company, together with its bonds to the face amount of such indebtedness as security therefor, and also, as a bonus for their assent, to receive common stock of the new company in an amount equal to the face of such indebtedness; (b) J. H. Reed to surrender the indebtedness held by him, and for such, as well as for the indebtedness for which he had provided his personal collateral, to receive preferred stock equal at face to the face amount of all such indebtedness, and a like amount of common stock; (c) $1,500,000 par value of common stock of the new company to be issued in exchange for stock of the Montana company; (d) $5,000,000 par value of common stock of the new company to be held in reserve for the redemption and retirement of its bonds. These bonds to be divided into two series: Series A, $200,000, and series B, $2,300,000—series A to have priority, to be delivered to the committee for disposal, the proceeds thereof to be used to pay the necessary expenses incident to preserving the property, to provide temporarily for continuing operations, and to prosecute to a limited extent certain development work. It is also recited that all these bonds would be secured by pledge of all the bonds and stocks of the Montana company acquired under the plan, and, "in the event that the new company shall find it practicable to acquire the property of the Montana company, then the bonds of the new company may be made a first lien upon such property." The plan proposed was satisfactory, and on the same day an agreement was entered into between the committee, J. H. Reed, and the holders of indebtedness of the Montana company, to accept and effectuate it. It is worthy of note that in the agreement the plan is character-

ized as "plan of reorganization" no less than eight times; that the committee are authorized and vested with ample power and discretion to carry it out; and that the expenses incurred by the committee in that behalf shall be paid by the new company. It is proper, also, to observe that Mr. Reed was president of the Montana company at this time, and continued to be such during all the ensuing period to which this narrative relates.

The committee set about their work, and on March 26, 1908, made a proposal to the plaintiff in effect the same as set forth in the plan of reorganization above referred to, and containing the following provision: "It is the understanding that your company will set aside 300,000 shares of the full paid, nonassessable, common capital stock of your company, of the par value of $5 each, to be issued to the stockholders of the Pittsburg & Montana Copper Company in exchange, share for share, for the outstanding capital stock of said Pittsburg & Montana Copper Company. The undersigned will turn over to your company for exchange, upon the terms aforesaid, all the shares of the common capital stock of said Pittsburg & Montana Copper Company deposited or hereafter to be deposited with us for such purpose." The proposal of the committee was on March 27, 1908, accepted by the unanimous vote of the five stockholders of plaintiff convened for that purpose, and its directors were commanded to do all things necessary to make the acceptance effectual. Thereupon, by separate resolutions, the stockholders of the plaintiff authorized the increase of its capital stock from $1,000 to $11,000,000, divided into 2,200,000 shares at the par value of $5 each, of which $1,000,000 should be preferred; authorized the issuance of $2,500,000 six per cent bonds; approved the form and execution of a collateral trust agreement relative to said bonds; directed the issuance of its negotiable notes to the amount of $2,061,009.92; authorized the acquisition of the shares of stock in the Montana company by the issuance of plaintiff's common stock on the basis of share for share—all "as provided in the proposition" of the committee. These resolutions were complied with in all respects by the directors and officers of the plaintiff, including the execution of the collateral

trust agreement. This agreement was with the Union Trust Company of Pittsburg, as trustee, and made to date from December 1, 1907; it transferred to the trustee all the bonds and stocks of the Montana company, to be acquired by the plaintiff, for the security and benefit of all persons who might hold the bonds of the plaintiff; it commanded the trustee to transfer to such persons as the committee might designate a sufficient number of shares of the Montana company's stock to qualify such persons to act as directors of that company; it continued the committee in their functions, expressly stipulating that the committee should have the right to vote, as representatives of the plaintiff, all shares of stock subject to the agreement and notwithstanding the transfer thereof in trust, so long as the plaintiff should not be declared in default; it provided that, whenever requested by the committee and by resolution of plaintiff's directors, the trustee should execute its proxy or power of attorney to vote the shares of the Montana company stock subject to the agreement, in favor of the increase or reduction of the capital stock of that company, and that said company might, with the consent of the committee, be merged or consolidated with, or all or any part of its property be sold or conveyed to, the plaintiff; it directed the trustee to extend, renew, sell or execute options for the sale of stocks and bonds of the Montana company subject to the agreement, upon such terms and conditions as the committee and plaintiff's directors might authorize, and fixed the disposition of the proceeds of such sale; and it contained a clause to the effect that, in case of a sale of all or any of the property of the Montana company at any judicial or other sale, the trustee might, and upon demand of the committee should, purchase or permit the plaintiff to purchase such property, using the bonds, stocks, and indebtedness covered by the agreement, to make payment therefor, and, in case of such purchase by the trustee, such steps should be taken as the committee might direct to cause the property to be vested in the plaintiff or in some other corporation organized or to be organized for the purpose.

Pursuant to the proceedings above outlined, there was on May 1, 1908, addressed to the stockholders of the Montana company a notice, signed by its secretary, outlining the substance of the plan above discussed, and it was therein stated that the new company formed to take over the stocks and indebtedness of the Montana company "will be at liberty to collect from the latter company at any time. The creditors, in arranging to form this company, have set aside $1,500,000 of common stock, or 300,000 shares of the par value of $5 each, to be used to acquire the shares of stock of the Pittsburg & Montana Copper Company from those holders who may desire to sell, *viz.*, for each share of stock of the Pittsburg & Montana Copper Company, of the par value of $100 offered, the new company will issue one share of its common stock of the par value of $5. The advantage to stockholders of becoming stockholders in the creditor company is sufficiently obvious. * * * This offer, as above stated, will remain open until June 1st, 1908."

By June 1, 1908, the plaintiff had acquired or contracted for all the bonds of the Montana company, to the face amount of $2,216,000; had acquired unsecured notes of the Montana company to the face amount of $1,084,360.07; had acquired the greater portion of the 264,810 shares of the Montana company stock, which ultimately came into the plaintiff's hands—all as contemplated in the plan and proceedings above mentioned. On July 1, 1908, Mr. Reed became president of the plaintiff, and from this time on the plaintiff and the Montana company possessed the same executive officers, to-wit: J. H. Reed, president; R. T. Rossell, secretary. According to the testimony of these gentlemen, an earnest effort was made during this period and up to June, 1909, with the aid of funds amounting to $188,550.92, procured by the committee through the sale of plaintiff's series A bonds, to keep the Montana company afloat, to restore it to the status of a profitable concern, and to avoid foreclosure, but in April, 1909, it became apparent that these efforts would be vain. The Montana company had no funds with which to pay the interest and installment of principal due June 1, 1909, upon its bonds, and for this reason was compelled to default,

whereupon, on demand of the committee, one member of which was a director of the Montana company, one member of which was a director of the plaintiff, and one member of which was a director of both companies, the plaintiff required the trustee to foreclose the mortgage given by the Montana company to secure said bonds. Foreclosure was commenced in the court of common pleas of Allegheny county, Pennsylvania, on July 8, 1909; on the same day a receiver was appointed, the Montana company having appeared and confessed the bill. A sale was ordered and later held, and at the sale plaintiff bid in the property valued by it at $6,000,000 for the upset price fixed by the Pennsylvania court, to-wit, $5,000. The plaintiff went into possession and has since operated the property. On September 14, 1909, it executed a "supplemental indenture" with the Union Trust Company of Pittsburg, mortgaging all the property so acquired, as further security for the bonds of plaintiff and pursuant to the collateral trust agreement dated December 1, 1907. The annual statements of the plaintiff as filed up to May 22, 1912, show that all its issued stock, with the exception of $100, was issued in consideration of bonds, promissory notes and stocks of the Montana company. The value of the plaintiff's stock issued to stockholders of the Montana company is vastly in excess of Forsell's claim.

We have thus detailed, with unnecessary elaboration perhaps, the steps leading up to plaintiff's acquisition of the property in question, in order that the statement might furnish its own commentary. It is suggested, however, that the evidence does not establish, but negatives, the existence of any special intent to exclude or defraud Forsell. So much may be granted, and yet the plaintiff is in no wise aided; what was done was intended, and its effect was to exclude Forsell and amounts to a fraud in law upon him. Counsel dispute this and deny that it avails Forsell, if true. They say that there was no scheme of reor- [9] ganization, merely a plan to fund indebtedness; that the foreclosure happened, not as a part of that or any plan, but in spite of the wishes of all concerned and the efforts and advancements of the creditors to prevent it; that there has been

no retention of interest or participation by the stockholders of the Montana company, because the exchange was made before foreclosure; that the foreclosure and the sale thereunder were regular and are beyond attack, and therefore the right of plaintiff is not open to doubt. Such reasoning does violence to both fact and law. Everything that happened was within, and nothing that happened was without, the scope of the committee's plan, and the entire proceedings appear to have been personally conducted by the committee in order to prevent material departures from the plan. We need not question that its primary object may have been to protect the creditors whose assent was procured, and that all concerned may have hoped to avert a foreclosure. Foreclosure was nevertheless contemplated at all times, provisions being made which were afterward followed, to acquire the property in that event, and to mortgage it again as further security for the plaintiff's bonds. It was in view of the fact that the plaintiff should be at liberty to collect from the Montana company at any time, necessarily by foreclosure in case of failure to pay, that the exchange of stock was made, and clearly with the idea that the stockholders who assented should not be excluded from all participation in the property, whatever might betide. The legal result of such a situation is well established, according to the supreme court of the United States, upon the principle: "That stockholders are not entitled to any share of the capital stock nor to any dividend of the properties until all the debts of the corporation are paid." (*Chicago, R. I. & P. Ry. Co.* v. *Howard,* 74 U. S. (7 Wall.) 392, 19 L. Ed. 117.)

The same authority in a later case said: "Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation, which recognize and preserve any interest in the stockholders, without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose

and exclude inferior lienholders or general unsecured creditors and stockholders, he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors, first of secured, and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." (*Louisville Trust Co.* v. *Louisville etc. Ry. Co.*, 174 U. S. 674, 682, 43 L. Ed. 1130, 19 Sup. Ct. Rep. 827, 830.)

Again: "Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But of course such a transfer by stockholders from themselves to themselves cannot defeat the claim of a nonassenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet, when he appeared and established his debt, the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company. * * * There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree." (*Northern Pac. Ry. Co.* v. *Boyd, supra.*) To the same effect, see *Central Imp. Co.* v. *Cambria Steel Co.*, 201 Fed. 811, 120 C. C. A. 121; *Farmers' Loan & Trust Co.* v. *Missouri I. & N. Ry. Co.* (C. C.), 21 Fed. 264; *Northern Pac. Ry. Co.* v. *Boyd,*

177 Fed. 804, 101 C. C. A. 18; *St. Louis Trust Co.* v. *Des Moines N. & W. Ry. Co.* (C. C.), 101 Fed. 632; *Central of Georgia Ry.* v. *Paul*, 93 Fed. 878, 35 C. C. A. 639; note, 11 L. R. A. (n. s.) 1125 *et seq.*

The application of these decisions to the case at bar is vigorously challenged. It is said of the *Boyd Case* particularly that it rests upon the trust fund theory, tenable enough in that case because the property was in the hands of a receiver when made the subject of reorganization, but untenable here because the property was not in that situation. The Boyd decision does not postulate the receivership as a factor in the conclusion reached. It determines broadly that, as between stockholders and creditors, the former cannot be preferred by any arrangement whatever, and we see nothing in it to conflict with the case of *Ames & Frost* v. *Heslet*, 19 Mont. 188, 61 Am. St. Rep. 496, 47 Pac. 805, in which the trust fund theory is criticised so far as preferences among creditors is concerned. Our view is succinctly expressed by the supreme court of Iowa in *Luedecke* v. *Des Moines Cabinet Co.*, 140 Iowa, 223, 32 L. R. A. (n. s.) 616, 118 N. W. 456: "We do not recognize the trust fund doctrine to the extent that it has obtained in some of the courts, but are of opinion that corporate creditors are entitled in equity to the payment of their debts before any distribution of corporate property is made among the stockholders, and recognize the right of a creditor of a corporation to follow its assets or property into the hands of anyone who is not a good faith holder in the ordinary course of business." Moreover, the property in question was in the custody of the law when it was acquired by the plaintiff, and such acquisition was part of the plan previously agreed upon under which the stockholders who assented were to retain an interest in it. We do not question the validity of the decree of foreclosure, but we look behind it and the mere order of events, and we discern clearly that the proper place of the entire transaction is under the rule announced in the cases cited above.

It is quite true that not all—only thirteenth-fifteenths—of the old stockholders of the Montana company exchanged their

shares in that company for shares of stock in the plaintiff; but it does appear from the record that, of the $6,000,000 of stock issued by the plaintiff, all, save $100, was issued to the stockholders and creditors of the Montana company. The existence of these creditors in the shareholding body of the plaintiff does not make it an innocent purchaser or put them in a position to complain. The supreme court of Pennsylvania in an analogous situation said: "If the corporation had merely changed its name, there could have been no doubt of the continued liability of the property. As already said, a majority of the stockholders in the new company are simply the stockholders of the old company holding as such, and without other consideration. As to these, it has been a mere change of name. As to the other or new stockholders, it appears from the agreed facts that they were creditors of the old company, and hold their present stock solely in consideration of their former claims as creditors. They paid nothing else for it; and they must have known that the new corporation into which they entered in this way was not a new enterprise, * * * but a new turn in the old enterprise, all of whose property was being practically handed over, not to them alone in payment, which they might, perhaps, rightfully have accepted, but to them in conjunction with their late debtors. Under such circumstances, they were bound to take notice of the nature of the transaction, and to know that equity would still regard the property as a trust for the payment of existing debts, and would follow it on behalf of creditors until it should get into the hands of innocent purchasers for value. Such purchasers they were not. The old stockholders were not purchasers for value at all; and the new stockholders were not innocent, for they knew, or were bound to take notice, of the taint in their coadventurers' title." (*Montgomery Web Co.* v. *Dienelt*, 133 Pa. 585, 596, 19 Am. St. Rep. 663, 19 Atl. 428, 430.)

It is insisted, however, that, assuming fraud in law to have been established, it is of no avail to the defendants because Forsell's answer pleads actual fraud, and because, when the evi-

dence was all in, the Union Trust Company of Pittsburg was demonstrated to be a necessary party on account of the mortgage executed by the plaintiff on September 14, 1909. It is a [11, 12] fact that some of the allegations of Forsell's answer seem to charge actual fraud, and these, of course, cannot be held established by proof of fraud in law. (*Finch* v. *Kent*, 24 Mont. 268, 61 Pac. 653.) In our opinion, however, these allegations may be treated as surplusage, for it is easy to be seen that the theory of the answer is fraud in law, and without these allegations the answer still pleads a state of facts from which the conclusion of fraud in law must flow. Having supported these, the failure to prove actual fraud is unimportant. As to the second point, based on the mortgage of September 14, 1909, the answer is not far to seek; the trustee took no better title [13] than the plaintiff had to give, and, if the property was acquired subject to the charge of Forsell's claim, the mortgage is in the same boat; the trustee as such has no interest independently of the persons for whom it holds in trust, and these are the old creditors of the Montana company (by exchange of their notes and bonds the present creditors and stockholders of the plaintiff), who are not in position to complain; and finally, if the trustee had been a necessary party, our statute afforded the plaintiff the means to have it brought in.

We have carefully considered such other questions as have been raised either directly or incidentally, and we are satisfied from the whole record that the decree, as originally entered, was unjustified. The court was therefore correct in granting the new trial, and the order appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

WHEELER & MOTTER MERC. CO., APPELLANT, *v.* MOON, RESPONDENT.

(No. 3,388.)

(Submitted May 27, 1914. Decided June 15, 1914.)

[141 Pac. 665.]

Sales—Bulk Sales Law—Constitution—Police Power—Garnishment—Creditors' Suit — Complaint — Sufficiency — Mingling Goods—Effect.

Bulk Sales Law—Constitutionality.

1. The bulk sales law (Rev. Codes, secs. 6131–6135), prohibiting sales of merchandise in bulk without the seller delivering to the buyer a sworn statement of the names and addresses of all the seller's creditors and declaring that, if the buyer does not apply the purchase price to the payment *pro rata* of the *bona fide* claims of creditors, the sale shall be fraudulent and void, *held* a proper exercise of the state's police power, and not unconstitutional, as violative of the equal protection or due process clauses of the Fourteenth Amendment to the Constitution of the United States.

[As to constitutionality of statutes prohibiting sales of merchandise in bulk, see note in Ann. Cas. 1912C, 706.]

Constitution—Statutes—Duty of Courts.

2. No Act of the legislature should be declared invalid unless the conflict between its provisions and the Constitution is plainly apparent.

Same—Policy of Law—Matter for Legislature.

3. The policy of the law is a matter of legislative control and does not concern the courts.

Attachment—Chattels in Possession of Third Person—Garnishment.

4. Since the enactment of H. B. No. 66 (Laws 1899, p. 139), amending section 895, Code of Civil Procedure (now sec. 6662, Rev. Codes), the only method of attaching personal property in the possession of a third person has been by garnishment process, *i. e.*, by leaving with such person a copy of the writ of attachment and a notice that the property is attached by virtue of the writ.

Bulk Sales Law—Creditors' Suit—Garnishment.

5. *Held*, under sections 6662 and 6821, Revised Codes, the latter of which provides that all property of a corporation, both real and personal and whether capable of manual delivery or not, may be attached on execution, in like manner as upon writs of attachment, that where plaintiff, after recovery of judgment against a mercantile corporation which had theretofore transferred its entire stock of merchandise in bulk to defendant without complying with the provisions of the bulk sales law, had served a copy of a writ of execution on defendant, together with a notice that any property in his possession or under his control belonging to the judgment debtor, was attached pursuant to the writ, a specific lien was created and fastened upon the property in favor of plaintiff sufficient to enable it to prosecute a creditors' bill against the purchaser.

Complaint—Demurrer—Matters of Form to be Disregarded.

6. In determining a general demurrer to a complaint, matters of form as well as allegations not appropriate to the purpose sought to be attained will be disregarded; and if, upon any view, the plaintiff is entitled to relief, the pleading must be sustained.

Bulk Sales Law—Violation—Buyer a Trustee for Creditor.

7. The failure of a buyer of a stock of merchandise in bulk to comply with the provisions of the bulk sales law converts him into a trustee of the property bought, to the extent of the creditor's claim against the seller, and in case the purchased goods have been mingled with those of the buyer so as to destroy their identity, or converted into cash, equity will hold him for their value.

Complaint—Inferences—Sufficiency.

8. Whatever is necessarily implied in, or to be inferred from, a complaint, is to be deemed directly alleged.

Same—Ambiguity—General Demurrer.

9. Ambiguity in a complaint cannot be reached by a general demurrer.

Appeal from District Court, Park County; Albert P. Stark, Judge.

ACTION by the Wheeler & Motter Mercantile Company against L. T. Moon, garnishee. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Mr. Frank Arnold, for Appellant, submitted a brief as well as one in reply to that of Respondent, and argued the cause orally.

Mr. Fred. L. Gibson, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Prior to March 15, 1911, the Hefferlin Mercantile Company, a domestic corporation, was engaged in the general retail mercantile business at Livingston. About July 10, 1911, the Wheeler & Motter Mercantile Company secured a judgment in the district court of Park county against the Hefferlin Mercantile Company and W. N. and O. M. Hefferlin, and execution was issued thereon, but returned unsatisfied. Thereafter an *alias* execution was issued and served upon L. T. Moon as garnishee, who answered that he did not owe the judgment debtors

anything, and did not have in his possession or under his control any property belonging to them. Thereupon this action was instituted by the judgment creditor against Moon. In addition to the foregoing facts, the complaint charges that about March 15, 1911, the Hefferlin Mercantile Company sold its entire stock of merchandise *in bulk* to defendant Moon and to Anderson & Co. for an amount in excess of $5,000; that the purchasers immediately paid for the goods and took possession; that before paying the purchase price, defendant, Moon, did not demand, obtain or receive from the seller, its officers, or agent a verified statement containing the names of the creditors of the seller, "and said Hefferlin Mercantile Company did not furnish a written statement sworn to by said Hefferlin Mercantile Company, or any of its officers, or its managing agent, as provided in sections 6131, 6132, 6133, 6134 and 6135 of the Civil Code, Revised Codes of Montana 1907, of the names and addresses of all the creditors of said Hefferlin Mercantile Company to whom said Hefferlin Mercantile Company was then and there and at the time of the sale indebted, together with the amount of the indebtedness then and there due and owing or to become due or owing from said Hefferlin Mercantile Company to such creditors"; that defendant. Moon did not pay, or see to it that the purchase money was applied to the payment of, the *bona fide* creditors of said Hefferlin Mercantile Company, share and share alike, or at all; that at the time of the purchase of said stock of goods by defendant, Moon, plaintiff was, and for a long time prior thereto had been, a *bona fide* creditor of said Hefferlin Mercantile Company, on account of goods, wares and merchandise sold and delivered to said company for conducting its business; that at the time of said sale the value of the goods purchased by defendant Moon was greatly in excess of plaintiff's claim; that at the time of said sale each of said judgment debtors was insolvent; and that by reason of these facts such sale by the Hefferlin Mercantile Company to Moon was fraudulent and void. It is further alleged that no part of plaintiff's claim has ever been paid. The prayer of the complaint is that the pretended sale be set aside, and that defend-

ant. Moon be required to account to plaintiff for the value of the property so pretended to have been purchased by him, or the proceeds thereof if any of said goods have been sold, or so much thereof as may be necessary to satisfy plaintiff's judgment, and for general relief. To this complaint a general demurrer was interposed and sustained, in an order in which the court indicated that the reason for its ruling was that the Act known as the "Bulk Sales Law," is unconstitutional. Plaintiff, declining to plead further, suffered judgment to be entered against it, and appealed.

Our bulk sales law is Chapter 145, Laws of 1907, incorporated [1] in the revision as sections 6131, 6132, 6133, 6134, and 6135 of the Revised Codes. Section 6131 provides: "It shall be the duty of every person who shall bargain for, or purchase any stock of goods, wares or merchandise in bulk, for cash, or on credit, before paying to the vendor, or his agent or representative or delivering to the vendor, or his agent, any part of the purchase price thereof, or any promissory note or other evidence therefor, to demand of and receive from such vendor, or agent, or if the vendor or agent be a corporation, then from the president, vice-president, secretary or managing agent of such corporation, a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of indebtedness due or owing, and to become due and owing, by said vendor to each of such creditors; and it shall be the duty of said vendor, or agent, to furnish said statement, which shall be verified by an oath to the following effect." And this is followed by a form of verification. Section 6132 provides that if the purchaser at such bulk sale shall pay for the goods without having demanded and received the statement mentioned in the preceding section "and without paying, or seeing to it that the purchase money of the said property is applied to the payment of the *bona fide* claim of the creditors of the vendor as shown upon such verified statement, share and share alike, such sale, or transfer shall be fraudulent and void." Section 6133 provides a penalty for making a false

statement. Section 6134 defines a bulk sale as follows: "A sale and transfer in bulk in contemplation of this Act, shall be deemed to be any sale or transfer of an entire stock of goods, wares or merchandise out of the usual or ordinary course of business or trade of the vendor, or attempted to be sold or conveyed; *provided,* however, that if such vendor produces and delivers a written waiver of the provisions of this Act from his creditors as shown by such verified statements, then in that case, the provisions of this Act shall not apply." And section 6135 contains this exemption: "Nothing in this Act contained shall apply to executors, administrators, receivers, or any public officer acting under judicial process."

Prior to 1900 an Act of this character was practically unknown in the United States, but to-day nearly every state in the Union, as well as the District of Columbia, has one. These statutes differ somewhat in their phraseology, and vary in degree as to their stringency, but they all proceed upon the same general theory, are aimed at the same evil, and are so nearly alike in their provisions as to warrant the assumption that some efforts have been expended toward procuring uniform legislation upon the subject. The New York, Ohio, and Illinois Acts were declared unconstitutional, generally upon the grounds that the subject matter of the legislation is not within the police power; that these Acts make an unwarranted classification, and therefore deny to certain persons the equal protection of the law, and deprive the owner of his goods without due process of law, in contravention of the guaranties of the Fourteenth Amendment to the Constitution of the United States, or like provisions found in the state Constitutions. (*Wright* v. *Hart,* 182 N. Y. 330, 3 Ann. Cas. 263, 2 L. R. A. (n. s.) 338, 75 N. E. 404; *Miller* v. *Crawford,* 70 Ohio St. 207, 1 Ann. Cas. 558, 71 N. E. 631; *Off & Co.* v. *Morehead,* 235 Ill. 40, 126 Am. St. Rep. 184, 14 Ann. Cas. 435, 20 L. R. A. (n. s.) 167, 85 N. E. 264.) The Utah Act of 1901 (Laws 1901, Chap. 67) made no exemption of sales conducted by public officers or persons acting under court orders, and was held invalid (*Block* v. *Schwartz,* 27 Utah, 387, 101 Am. St. Rep. 971, 1 Ann. Cas. 550, 65 L. R. A. 308, 76

Pac. 22), while the Indiana Act of 1903 (Laws 1903, Chap. 153) applied only to creditors who furnished merchandise or money to carry on the business, and for that reason was held unconstitutional. (*McKinster* v. *Sager*, 163 Ind. 671, 106 Am. St. Rep. 268, 68 L. R. A. 13, 72 N. E. 854.)

Statutes similar to our own have been upheld as valid legislative enactments in Washington, Massachusetts, Connecticut, Georgia, Oklahoma, Michigan, Tennessee, Minnesota, Nebraska, and in the federal court. (*McDaniels* v. *Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 60 L. R. A. 947, 71 Pac. 37; *Squire & Co.* v. *Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Walp* v. *Mooar*, 76 Conn. 515, 57 Atl. 277; *Young* v. *Lemieux*, 79 Conn. 434, 129 Am. St. Rep. 452, 8 Ann. Cas. 452, 20 L. R. A. (n. s.) 160, 65 Atl. 436; *Jaques & Tinsley Co.* v. *Carstarphen Warehouse Co.*, 131 Ga. 1, 62 S. E. 82; *Williams* v. *Bank*, 15 Okl. 477, 6 Ann. Cas. 970, 2 L. R. A. (n. s.) 334, 82 Pac. 496; *Spurr* v. *Travis*, 145 Mich. 721, 116 Am. St. Rep. 330, 9 Ann. Cas. 250, 108 N. W. 1090; *Musselman Grocer Co.* v. *Kidd, Dater & Price Co.*, 151 Mich. 478, 115 N. W. 409; *Neas* v. *Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *Thorpe* v. *Pennock Mercantile Co.*, 99 Minn. 22, 9 Ann. Cas. 229, 108 N. W. 940; *Appel Mercantile Co.* v. *Barker*, 92 Neb. 669, 138 N. W. 1133; *In re Gaskill* (D. C.), 130 Fed. 235.)

Young v. *Lemieux*, above, was removed to the supreme court of the United States, and there the contentions that these statutes violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States were swept aside as without merit. That the subject matter of such Acts is well within the police power of the states was declared by the supreme court to be too plain to require discussion. The position of the supreme court of Connecticut that the Connecticut Act does not impose such restrictions upon transactions in merchandise in bulk as amount to unreasonable deprivation of property was sustained. The opinion of the court is summarized in the concluding paragraph, as follows: "As the subject matter to which the statute relates was clearly within the police powers of the state, the statute cannot be held to be re-

pugnant to the due process clause of the Fourteenth Amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere usurpation of power. (*Booth* v. *Illinois*, 184 U. S. 425, 46 L. Ed. 623, 22 Sup. Ct. Rep. 425.) This, we think, is clearly not the case. So, also, as the statute makes a classification based upon a reasonable distinction, and one which, as we have seen, has been generally applied in the exertion of the police power over the subject, there is no foundation for the proposition that the result of the enforcement of the statute will be to deny the equal protection of the laws." (*Lemieux* v. *Young*, 211 U. S. 489, 53 L. Ed. 295, 29 Sup. Ct. Rep. 174.) A year later the case of *Musselman Grocer Co.* v. *Kidd, Dater & Price Co.*, above, was likewise removed to the same court, and, upon the authority of *Lemieux Case*, the Michigan statute was also upheld. (*Kidd, Dater & Price Co.* v. *Musselman Grocer Co.*, 217 U. S. 461, 54 L. Ed. 839, 30 Sup. Ct. Rep. 606.)

The difference between our statute and the Utah and Indiana Acts is so marked that the decisions from the courts of those states are not precedents here; while, in our opinion, every vestige of argument advanced in the opinions from the Ohio, New York and Illinois courts is destroyed by the better reasoning found in the opinions of the courts which uphold similar laws. An Act of the legislature ought not to be treated lightly, and [2] no measure should be declared invalid unless the conflict between its provisions and the Constitution is plainly apparent. The purpose of this Act is manifest. It does not apply to the merchant who is out of debt, and it works no hardships upon the one who is in debt. The sale of his entire stock in bulk is not prohibited, but that his just debts be paid is insisted upon. The provisions of our Constitution were not intended to cloak the fraudulent acts of one who seeks by an overnight transaction to defeat the claims of confiding creditors. So far as the administration of the law may hamper the operations of honest tradesmen, it must be accepted as an imposition for the general

[3] welfare. The policy of the law, however, is a matter for legislative control, and does not concern the courts.

In our opinion, the statute does not infringe upon any provision of our state Constitution, and is a valid exercise of police power.

Counsel for respondent contends that, even though the statute be upheld, the order of the court should be affirmed, because, [4] it is insisted, the complaint discloses that plaintiff is but a "roving" creditor of the Hefferlin Mercantile Company. Upon the assumption that plaintiff's action is in the nature of a creditor's bill, it is insisted that it is not disclosed that plaintiff brought itself into privity with the property transferred to defendant Moon by the sale of March 15, 1911, by attachment or other lien, as required by courts of equity generally. (*Wilson* v. *Harris*, 21 Mont. 374, 54 Pac. 46; *Raymond* v. *Blancgrass*, 36 Mont. 449, 15 L. R. A. (n. s.) 976, 93 Pac. 648; *Wyman* v. *Jensen*, 26 Mont. 227, 67 Pac. 116.) In *Wilson* v. *Harris* there was considered subdivision 3 of section 186, First Division, Compiled Statutes of 1887, which read as follows: "Personal property capable of manual delivery shall be attached by taking it into custody." And it was held by a divided court that the method there indicated was exclusive. By an amendment approved March 7, 1899, that subdivision, which had been carried into the Code of Civil Procedure of 1895, as subdivision 3 of section 895, was made to read as follows: "Personal property capable of manual delivery, must be attached by taking it into custody, except in cases in which personal property, capable of manual delivery is in the possession of a third person, and such personal property, so in the possession of a third person, may be attached in the same manner as debts or credits and other personal property not capable of manual delivery as hereinafter provided." While subdivision 5 of the same section was amended to provide: "5. Debts or credits and personal property not capable of manual delivery, and personal property in the possession of a third person, must be attached by leaving with the person owing such debt, or having in his possession or under his control such credits and personal property, or with his agent, a copy of the writ

and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control belonging to the defendant, are attached in pursuance of such writ." (Laws of 1899, p. 139.) The section as thus amended is now 6662, Revised Codes.

Whatever ground there may have been for a diversity of opinion prior to the amendment was removed altogether by the legislature, and since 1899 the *only* method of attaching personal property in the possession of a third person has been by garnishment process. Whenever the officer making the service leaves with the third party having possession of personal property belonging to the debtor, a copy of the writ of attachment and a notice that the property is attached in pursuance of such writ, the result is an attachment of such property, just as effective for every purpose as if it had been taken into actual custody by the officer, and the resulting lien is, in contemplation of law, of precisely the same character. If, then, the lien created by the actual seizure of personal property under attachment prior to 1899 was sufficient to bring the creditor into such privity with the property thus impounded as to enable him to pursue the remedy by creditors' bill—and the authorities are unanimous that it was—the lien created by the service of a copy of the writ of attachment and the notice upon a third party having in his possession personal property belonging to the debtor, pursuant to the amended statute, is for the same reason sufficient for that purpose.

But in the present instance the writ of attachment was not employed. Plaintiff, having reduced its claim to judgment, sought to fasten a lien upon personal property of the judgment debtor in the hands of Moon, a third party, by the service of an execution made in the same manner as attachment is levied under subdivision 5 of the amended statute of 1899, section 6662, Revised Codes, above. The question whether any lien was created by this service is before us.

Counsel for respondent argues—and not without some foundation—that the character of the writ of execution and the duty of the officers under it are such that actual possession of personal

[5] property capable of manual delivery is necessary to make the levy effective for any purpose, and *Wyman* v. *Jensen*, above, is cited to support this contention. *Wyman* v. *Jensen* appears to have been decided upon the authority of *Wilson* v. *Harris*, and without specific reference to the change wrought in the statute in the *interim* by the amendment made in 1899. But, even so, there was ground for the assumption at that time that the amendment to the attachment statute was not intended to affect the execution statute. However, that ground was removed completely by the legislature in 1909 in adopting the arrangement as well as the substance of the Revised Codes of 1907. (Chapter 1, Laws of 1909.) Since that time the language of section 6821, Revised Codes, "Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment," is directly referable to the amended attachment statute found in section 6662, above; and whatever other effect it may have had, the service of the copy of the writ of execution upon Moon, together with a notice that any personal property in his possession or under his control belonging to the Hefferlin Mercantile Company was attached in pursuance of such writ, operated to fasten upon such property a specific lien in favor of this plaintiff sufficient to enable it to prosecute a creditors' bill against Moon.

We shall not stop to determine the form of action presented [6] by this complaint. "The form in which an action is brought is of no consequence; nor does it matter that the complaint contains allegations not appropriate to the purpose sought to be attained. In determining the issues of law presented by a general demurrer to the complaint, * * * matters of form will be disregarded, as well as allegations that are irrelevant or redundant; and if, upon any view, the plaintiff is entitled to relief, the pleading will be sustained." (*Raymond* v. *Blancgrass*, above.)

In *Kohn* v. *Fishbach*, 36 Wash. 69, 104 Am. St. Rep. 941, 78 Pac. 199, it was held, in construing a bulk sale statute in every essential identical with our own, that the failure of the pur-
[7] chaser to comply with the law converts him into a trustee of the property purchased, to the extent of plaintiff's claim at least, and it is immaterial that he may have mingled the purchased goods with property of his own so as to destroy their identity, or converted them into cash. Equity looks beyond the mere form to the substance, and will hold the trustee for the value. (*Appel Mercantile Co.* v. *Barker*, above; *Jaques & Tinsley Co.* v. *Carstarphen Warehouse Co.*, above.) If defendant Moon had the identical property in his possession at the time the execution was levied, he is liable under section 6667, Revised Codes. So that, from whatever viewpoint the complaint be treated, it is sufficient to entitle plaintiff to relief, and the general demurrer should have been overruled.

It is true that the complaint does not allege directly that Anderson & Co. did not comply with the law. The effect is the
[8] same, however; for in that portion of the complaint quoted above, it is made to appear that the Hefferlin Mercantile Company did not furnish a list of creditors, and plaintiff's allegation that no part of its claim has been paid discloses that the demands of the law were not met. The complaint may be
[9] somewhat ambiguous, but, if so, that character of defect was not reached by a general demurrer. (Sec. 6535, Rev. Codes.)

The judgment is reversed and the cause is remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

CHESNUT, APPELLANT, *v.* SALES, RESPONDENT.

(No. 3,386.)

(Submitted May 27, 1914. Decided June 15, 1914.)

[141 Pac. 986.]

Claim and Delivery—Detention of Chattels Pending Appeal—Damages Recoverable.

The successful party in an action in claim and delivery recovering damages for the detention of the chattels up to verdict in addition to their return, and whose judgment after affirmance by the supreme court has been satisfied, may maintain a separate action for damages for the detention of the property pending appeal from the judgment.

[As to the doctrine that property wrongfully taken is wrongfully detained until restored to owner, see note in 80 Am. St. Rep. 753.]

Appeal from District Court, Gallatin County, Ninth Judicial District; Albert P. Stark, Judge of the Sixth District, presiding.

ACTION by Ben Chesnut against A. H. Sales. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Mr. George D. Pease, for Appellant, submitted a brief, and argued the cause orally.

When Chesnut made a demand for his mules, after the verdict was rendered in his favor, and such demand was refused by Sales, we contend that this was a separate and distinct tort for which the defendant Sales became liable. The judgment in the former case directed Sales to return the property to Chesnut. He could have complied with this judgment and have relieved himself from all liability or risk whatsoever, but instead, he chose to retain the mules and thereby assumed the risk of damages in the event that he should be unsuccessful in the appellate court. The appellant contends that he is supported both by the reason and the authorities in his contention. (Sec. 6628, Rev. Codes; *Williams* v. *Phelps,* 16 Wis. 80; *Saling* v. *Bolander,* 125 Fed. 701, 60 C. C. A. 469; *Washington Ice Co.* v. *Webster,* 125 U. S. 426, 31 L. Ed. 799, 8 Sup. Ct. Rep. 947; *Devol* v. *Dye,* 6 Ind. App. 257, 33 N. E. 253.) The case of *Fair* v. *Citizens' State Bank,* 69 Kan. 353, 105 Am. St. Rep. 168, 2 Ann. Cas. 960,

76 Pac. 847, is exactly in point so far as the issues of this case are concerned. (See, also, *Clow & Sons* v. *Yount*, 93 Ill. App. 112; *Yandle* v. *Kingsbury*, 17 Kan. 195, 22 Am. Rep. 282; *Kennett* v. *Fickel*, 41 Kan. 211, 21 Pac. 93; *Allen* v. *Fox*, 51 N. Y. 562, 10 Am. Rep. 641; Wells on Replevin, sec. 530.)

In Montana the action of replevin is primarily an action to obtain the possession of personal property and not to obtain damages (*Gans* v. *Woodfolk*, 2 Mont. 458; *Chesnut* v. *Sales*, 44 Mont. 534, 121 Pac. 481), and such being the case, it would seem that Chesnut would not be precluded from bringing a separate action to recover damages for the unlawful detention of his property after he had recovered judgment for the possession of the same.

Mr. Walter Aitken, for Respondent, submitted a brief and argued the cause orally.

The doctrine announced in *Williams* v. *Phelps*, 16 Wis. 80, upon which appellant relies, to-wit, that plaintiff in whose favor judgment was rendered, in the justice's court, in an action for the recovery of personal property unlawfully detained, is entitled to recover all the damages he has sustained by the detention of the property pending appeal, to the district court, is undoubtedly good law and has the support of other courts. (See *Hanf* v. *Ford*, 37 Ark. 544, 548.) *Williams* v. *Phelps*, 16 Wis. 80, has also been cited in a number of later cases: *Zitske* v. *Goldberg*, 38 Wis. 216, 224; *Hartley State Bank* v. *McCorkell*, 91 Iowa, 660, 60 N. W. 197; *Bell* v. *Campbell*, 17 Kan. 211. But it is apparent that the above doctrine applies, and can apply only, to appeals from justice's courts to trial courts where the case is tried anew; and in reason and in law cannot and does not apply to appeals to the supreme court after verdict and judgment in the trial court. This rule is well settled by the decisions of appellate courts in various jurisdictions. For example, in New York, in the case of *Corn Exchange Nat. Bank* v. *Blye*, 56 Hun (N. Y.), 403, 10 N. Y. Supp. 151, the supreme court of that state, in 1890, held that: "The judgment in an action of replevin only terminates the title to the chattels, and

after judgment in the trial court no damages for future detention pending an appeal can be included therein. The detention after the trial is a new offense and a claimant may treat such additional detention as constituting a new cause of action." But the court of appeals, on review of this case (*Commerce Exch. Nat. Bank* v. *Blye*, 123 N. Y. 132, 25 N. E. 208), promptly reversed this holding. To the same effect is the decision of the supreme court of Kentucky in *Head* v. *Perry*, 1 T. B. Mon. (Ky.) 253, where it is held that there can be no recovery, either at law or in equity, for the detention of property after hire, rents or damages are assessed, however long the final determination of the cause may be postponed by the delays of the judge, by appeals, or injunction, except where specially provided by statute. For such a remedy there is at common law no precedent. (*Alderson* v. *Bigger's Admr.*, 4 Munf. (Va.) 528.) If any damage resulted to appellant in this case it resulted from the pursuit of what respondent conceived to be his legal remedy. And for that the law allows no compensation. "No cause of action exists for the recovery of costs or other expenses or damages occasioned by successful and *bona fide* legal process, however much it might have operated to the prejudice of another. More than that, if the remedy is invoked in good faith, no legal injury results, though there proves not to have been sufficient cause therefor and the suit fails." (1 Cyc. 648-c.)

MR. JUSTICE SANNER delivered the opinion of the court.

The appellant, Ben Chesnut, as the owner of two certain mules and a set of harness, brought an action in the district court of Gallatin county against the respondent, A. H. Sales, to recover the possession of the same, with damages for the detention thereof. After issue joined and a trial upon the merits, Chesnut had judgment for the return of the property and damages, whereupon he demanded the return of the mules. Sales refused to deliver, but appealed to this court, giving the stay bond required by section 7103, Revised Codes. The appeal was unsuccessful (*Chesnut* v. *Sales*, 44 Mont. 534, 121 Pac. 481), and upon remission of the cause to the district court, Sales re-

turned the property and otherwise satisfied the judgment. Thereafter Chesnut brought this action to recover damages for the wrongful withholding of the mules pending the appeal. The defense is that the retention of the mules was lawful and justifiable, the execution of judgment having been stayed pending the appeal as provided by law. The cause was submitted to the court sitting without a jury, upon the pleadings and upon a stipulation to the effect "that if as a matter of law, the plaintiff is entitled to recover in this action at all, he is entitled to recover the sum of one dollar and one-half for each and every day * * * from the 17th day of May, 1911, to the 26th day of February, 1912; * * * that during all of said period defendant was the owner and entitled to the possession of said mules, except in so far as his right to the possession thereof had been suspended and stayed by the appeal." Judgment was entered that Chesnut take nothing, and awarding costs to Sales. A motion for a new trial was denied, and Chesnut appeals from such denial as well as from the judgment.

It is conceded by both sides that but one question is pre-
[1] sented, *viz.*, Can a party who had judgment for the recovery of personal property and damages for its detention up to verdict, and whose judgment after affirmance by this court has been satisfied, maintain a separate action for the detention of such property pending an appeal from the judgment? Upon the solution of this question the authorities are at variance. Conspicuous among those which hold with the respondent is *Commerce Exch. Nat. Bank* v. *Blye*, 123 N. Y. 132, 25 N. E. 208, a case resembling that at bar in every essential save only the demand after judgment. The court said: "The complaint discloses a single tort, which has formed the subject of an action and been redressed by a judgment therein. It alleges no new or separate demand, but simply a continuance of the refusal to obey it, after judgment and pending the appeals therefrom. If the defendant's continued possession during that interval was a wrong at all, it was not new or separate, but a continu-

ance of that sued upon, and dependent upon the demand proved in that action. At the most, the complaint shows an extension of the damages beyond the date of the trial judgment, and growing out of the delay inseparable from the defendant's right of appeal; and so we are required to say, if we affirm this judgment, either that the damages flowing from a single wrong may be divided into two parts, and each part form the subject of a separate action, or that the exercise by the defendant of the right of appeal upon the precise terms and conditions dictated by the law constitutes a new and illegal detention of the property in controversy. The first proposition is of course inadmissible, and the judgment must stand, if at all, upon the second, and that necessarily involves the conclusion that the appeals taken, by reason of the delay which they occasioned, constituted a new detention and a new wrong for which a separate action could be maintained. Neither reason nor authority justify that conclusion. The appeals were taken by the defendant in pursuance of a lawful right and in performance of a clear duty. * * * We cannot admit that the taking of an appeal by the defendant constituted a new and separate detention of plaintiff's bonds because they remained in defendant's possession after delivery to him by the sheriff in accordance with the law of the chosen remedy. If that be so, added perils will surround appeals, and a prolific source of new actions will come into existence, and it will be difficult to say that one class of damages resulting from the law's delay may be recovered and all others be excluded. We think the right of appeal cannot be converted into a tort or wrong, and the delay it produces serve as a basis for a new action, and that the judgment, already rendered, closed the entire controversy." To the same effect are *Head* v. *Perry*, 1 T. B. Mon. (Ky.) 253; *Alderson* v. *Bigger's Admr.*, 4 Munf. (Va.) 528; *Abbott* v. *Land & Water Co.*, 161 Cal. 42, 118 Pac. 425; *Van Horne* v. *Treadwell*, 164 Cal. 620, 130 Pac. 5.

Impressed as we are by the reasoning of these cases, and realizing, too, that no effective appeal was open to respondent at bar unless he kept the property, we are nevertheless of the opinion that the appellant was entitled to recover. The mere

fact that the respondent had the lawful right to appeal from the judgment against him does not seem to us decisive. The right of appeal from an adverse decision is not any different in principle from the right to bring or defend an action or from any other right recognized by the law, yet the law books teem with rights which, when inadvisedly pursued, either directly or indirectly give rise to wrongs. The imposition of costs in every case, the allowance of interest upon money judgments pending appeals, and various other devices of the law that may be mentioned, are efforts to correct wrongs done in the assertion of rights. As apt an illustration as any may be found in the very case at bar, by supposing an appeal indecisive upon the merits, though successful to the point of reversal for retrial; for the jury upon the retrial, if they found for Chesnut, would have been authorized to award him damages measured by the value of the use of the property up to the date of their verdict (Rev. Codes, secs. 6760, 6803; *Morgan* v. *Reynolds,* 1 Mont. 163; *Chauvin* v. *Valiton,* 8 Mont. 451, 466, 3 L. R. A. 194, 20 Pac. 658), which would include the time taken to present and dispose of the appeal. This being so, what obstacle is presented by the mere right of appeal, to the recovery of the same damage when the appeal was in no sense successful? As we view the matter, no one, however honestly mistaken, has any absolute right to bring an unmeritorious suit, to interpose an unmeritorious defense, or to prosecute an unmeritorious appeal; and while it may be said that one cannot know his suit, defense, or appeal to be without merit until a court of last resort has spoken, he nevertheless accepts the contingency that the fact may be so declared; and when it is declared that a suit, defense or appeal was without merit, we see no reason why the party responsible should not answer in the way of costs, interest or special damages, as the case may be. The judgment at bar declared the appellant entitled to the possession of the property, and directed its return to him. Unless that declaration was erroneous it was the duty of respondent to yield the property to the appellant upon his demand, and not to cause him further damage by longer withholding it. The respondent could justify a further

detention only by the prosecution of a meritorious appeal; failing in this, he stood in the wrong, not for appealing, but for withholding the property after demand when there was no legal justification for so doing.

The question, then, is whether the act of respondent constituted a new wrong, or was merely a continuation of the original one. The New York court laid some stress upon the fact that in the *Blye Case* the complaint alleged no new or separate demand, but simply a continuation of the refusal to obey the original one, and there is room for the inference that had a separate demand been made after judgment, a different conclusion might have been reached. However that may be, the case at bar does disclose a separate demand after judgment, and it is the contention of appellant that this circumstance, coupled with the impossibility of recovering in the original action such damages as accrued pending the appeal, is ample warrant for this action. We accept this contention as sound. In the original action the award is fixed as of the date of the verdict; there is not, nor could there be, any method providing for the allowance in that action of further damages accruing after judgment and pending an unmeritorious appeal. Yet in every such case there may be, and in the instant case there was, a very substantial detriment thus caused. Upon the respondent's theory this is a wrong without a remedy—a sort of sacrifice which the prevailing party must make in order that his adversary may invoke the right of appeal—and belongs to the same category as the damages which may accrue from withholding the property between the date of the verdict and the date of judgment. We do not so apprehend it. It is not the theory of our Code that substantial damage suffered by one through the fault of another shall be unredressed, but that in all such cases the damaged party shall have full compensation. (Rev. Codes, secs. 6040, 6041, 6068, 6071.) Nor is the intention of the law that a judgment will follow so far behind the verdict as to be the cause of substantial damage; this is apparent from the Code provision requiring the entry of judgment within twenty-four hours after verdict (Rev. Codes, sec. 6800), and the instances in which

this is not done may well be ascribed either to the consent of the prevailing party or to the order of court in furtherance of justice. The primary object of replevin is to secure the return of personal property, the damages being merely incidental. Where a return of the property is possible, the owner is entitled to it; he may recover the value only in case a return cannot be made. (*Morgan* v. *Reynolds, supra; Chauvin* v. *Valiton, supra; Hynes* v. *Barnes,* 30 Mont. 25, 75 Pac. 523.) Had a return of the mules in question been impossible and the appellant by that fact become entitled to the value as fixed by the verdict, no one would question his right to damages pending the determination of the appeal, such damages being measured by the interest; and, since he was entitled to receive the property itself, the same considerations authorize the award of damages appropriate to the withholding of it, *viz.*, the value of its use during the same period. This conclusion finds more or less support in the following authorities from other jurisdictions: *Williams* v. *Phelps,* 16 Wis. 80, 83; *Saling* v. *Bolander,* 125 Fed. 701, 60 C. C. A. 469; *Devol* v. *Dye,* 6 Ind. App. 257, 33 N. E. 253; *Washington Ice Co.* v. *Webster,* 125 U. S. 426, 31 L. Ed. 799, 8 Sup. Ct. Rep. 947; *Fair* v. *Citizens' State Bank,* 69 Kan. 353, 105 Am. St. Rep. 168, 2 Ann. Cas. 960, 76 Pac. 847.

The judgment and order appealed from are reversed and the cause is remanded, with directions to enter judgment for the plaintiff in accordance with the terms of the stipulation.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied July 16, 1914.

PARCHEN, RESPONDENT, *v.* CHESSMAN, APPELLANT.

(No. 3,389.)

(Submitted May 28, 1914. Decided June 15, 1914.)

[143 Pac. 631.]

Equity — Reformation of Instruments — Mistake — Statute of Limitations—Waiver of Defense — Public Policy — Laches — Correction of Mistake—Demand—Promissory Notes—Renewal —Consideration.

Public Policy—How Determined.

1. What constitutes the public policy of a state and what is contrary to it are questions to be determined by reference to its legislative enactments, and, in their absence, to the decisions of its courts.

Statutes of Limitations—Defense may be Waived.

2. The defense of the statute of limitations may be waived by the party for whose benefit it is provided, either before or after the prescribed limit, and if it is not invoked at the proper time and in the manner prescribed, it cannot avail him even though it appears incidentally that the cause of action alleged against him is completely barred.

[As to necessity of pleading statute of limitations as defense in equity cases, see note in 8 Ann. Cas. 379.]

Promissory Notes—Statute of Limitations—Waiver—Public Policy.

3. *Held*, that a stipulation embodied in a promissory note, to the effect that the maker expressly waives all rights and benefits conferred by the statute of limitations, is not void as against public policy, and that by it he binds himself not to plead the statute—if not for all time—for at least a reasonable time, *i. e.*, until the expiration of an additional period of eight years after the period prescribed by section 6445, Revised Codes.

Reformation of Instruments—Mistake—When Decreed.

4. Where the parties to a contract agree upon the terms and conditions thereof and through mutual mistake the writing signed by them fails to express their agreement, or includes terms and conditions not agreed upon, a court of equity will reform it.

[As to mistake as ground for reformation of instruments, see note in 65 Am. St. Rep. 484.]

Same—Failure to Read Before Signing—Effect.

5. Though, generally speaking, failure of a party to read an instrument before signing it, will preclude relief by way of reformation, it will be granted when neglect in this behalf is excusable, and when, in view of all the circumstances, denial of it would permit one party to inflict a gross wrong upon the other.

Same—Signing Without Reading—Mistake of Scrivener.

6. Where the parties to the renewal of a promissory note intrusted the duty of formulating the writing to a scrivener, who mistakenly embodied in it a stipulation that the maker waived the benefit of the statute of limitations, the latter could have it reformed even though he signed and delivered it without reading it.

Same—Laches—What Does not Constitute.

7. Mere delay is not sufficient ground for the imputation of laches.

Same.

8. One, seeking the reformation of a writing on the ground of a mutual mistake of the parties to it was not required to act until he discovered that a mistake had been made; hence where defendant did not become aware of a mistake in a renewal note, until he saw a copy of it embodied in the complaint, could not be held chargeable with laches.

Same—Prior Demand for Correction of Mistake—When Unnecessary.

9. Demand by defendant upon plaintiff to correct the mistake in the writing before asking for reformation thereof, *held* to have been an unnecessary and idle ceremony under the circumstances of the case, the performance of which the law does not require.

Same—Promissory Notes—Stipulation Waiving Statute of Limitations—Consideration.

10. *Held*, that the pre-existing indebtedness evidenced by the note which the writing was intended to renew was a sufficient consideration for the entire contract of renewal; and that therefore the contention that the stipulation therein, whereby the maker waived the benefit of the statute of limitations, was without consideration, had no merit.

Appeal from District Court, Lewis and Clark County, First Judicial District; Lew. L. Callaway, one of the Judges of the Fifth District, presiding.

ACTION by Henry M. Parchen against William A. Chessman. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Mr. John B. Clayberg and *Mr. R. Lee Word*, for Appellant, submitted a brief; *Mr. Word* argued the cause orally.

Any attempt to waive the statute of limitations is against public policy and unenforceable, especially when the attempted waiver is for an indefinite time and made a part of the note sued upon. (*Nunn* v. *Edmiston*, 9 Tex. Civ. App. 562, 29 S. W. 1115; *Wright* v. *Gardner*, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116; *Moxley* v. *Ragan*, 10 Bush (Ky.), 156, 19 Am. Rep. 61; *Shapley* v. *Abbott*, 42 N. Y. 443, 1 Am. Rep. 548; *Greene* v. *Coos Bay R. R. Co.*, 23 Fed. 67, 10 Saw. 625; *Union Central Life Ins. Co.* v. *Spinks*, 19 Ky. 261, 7 Ann. Cas. 913, 69 L. R. A. 264, 83 S. W. 615, 84 S. W. 1160; *Moore* v. *Taylor*, 2 Tenn. Ch. App. 556; *Trask* v. *Weeks*, 81 Me. 325, 17 Atl. 162; *Smith* v. *Gillette*, 59 Tex. 86; *Harper* v. *Leal*, 10 How. Pr. (N. Y.) 276.) Statutes of limitations are statutes of rest and repose and are enacted

and enforced upon the ground of public policy, for the purpose of requiring reasonably speedy litigation settling the rights of the parties at a time before the death or removal beyond the jurisdiction of the court of important witnesses. Such a clause as the one found in the note sued upon, if held valid, would waive the statute of limitations indefinitely, and the plaintiff, or his heirs, successors or assigns, might delay one hundred years or indefinitely before bringing suit, and sue after the defendant, and all his witnesses were dead. Thus the jurisdiction of the court would be delayed and practically defeated. Such an effect is so clearly against public policy as to render the clause objected to absolutely void and unenforceable.

The clause in question is a mere *nudum pactum* and absolutely without consideration. (*Shapley* v. *Abbott*, 42 N. Y. 443, 1 Am. Rep. 548; *Kellogg* v. *Dickinson*, 147 Mass. 432, 1 L. R. A. 346, 18 N. E. 223; *Andreae* v. *Redfield*, 98 U. S. 225, 25 L. Ed. 158; *Green* v. *Coos Bay Wagon Road Co.*, 23 Fed. 67, 10 Saw. 625.)

A waiver of the statute of limitations applies only to time then past. (*Green* v. *Coos Bay Wagon Road Co.*, 23 Fed. 67, 10 Saw. 625.) In this case Judge Deady says: "The bar of the statute cannot be waived or renounced in advance, as that would put it in the power of individuals to dispense with the law contrary to public policy and peace it was intended to promote and preserve." (See, also, Wood on Limitations, 3d ed., sec. 76; *Tolle's Appeal*, 54 Conn. 521, 9 Atl. 402.) A waiver of the statute in advance would practically deprive the courts of jurisdiction for an interminable time and such contract or promise would necessarily be void. (*Shapley* v. *Abbott*, 42 N. Y. 443, 1 Am. Rep. 548; *Trask* v. *Weeks*, 81 Me. 325, 17 Atl. 162.)

A renewal note must be in the same form as the note renewed. This follows from the ordinary understanding of the word "renewal." As stated by the supreme court of Indiana, the word "renewed" or "renewal" as applied to promissory notes in commercial and legal parlance means nothing more than the substitution of another obligation for the old one. It means

to re-establish a particular contract for another period of time, to restore to its former condition an obligation on which the time of payment has been extended. (*Kedey* v. *Petty*, 153 Ind. 179, 54 N. E. 798.)

The clause objected to, being a written contract, the statute of limitations has run against it and rendered it inoperative. (*Kellogg* v. *Dickinson*, 147 Mass. 432, 1 L. R. A. 346, 18 N. E. 223; *Cameron* v. *Cameron*, 95 Ala. 344, 10 South. 506; *Newell* v. *Clark*, 73 N. H. 289, 61 Atl. 555; *Trask* v. *Weeks*, 81 Me. 325, 17 Atl. 162.)

The failure of appellant to read the note when it was executed, under the circumstances set up in the answer, does not prevent him from showing that the objectionable clause was improperly inserted. (*Palmer* v. *Hartford Ins. Co.*, 54 Conn. 488, 9 Atl. 248; *Smelser* v. *Pugh*, 29 Ind. App. 614, 64 N. E. 943; *Story* v. *Gammell*, 68 Neb. 709, 94 N. W. 982; *Taylor* v. *Glens Falls Ins. Co.*, 44 Fla. 273, 32 South. 887; *Silbar* v. *Ryder*, 63 Wis. 106, 23 N. W. 106; *Green Bay etc. Canal Co.* v. *Hewitt*, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588; *Linton* v. *Unexcelled Fireworks Co.*, 128 N. Y. 672, 28 N. E. 580; *Albany City Savings Inst.* v. *Burdick*, 87 N. Y. 40.)

Messrs. Galen & Mettler, for Respondent, submitted a brief; *Mr. Frank Mettler* argued the cause orally.

The statute limiting the time within which actions shall be brought has been said to be for the benefit and repose of individuals and not to secure general objects of policy or morals, and hence it may be laid down as a general rule that the protection of the statute may be waived by one entitled to rely upon it. (25 Cyc. 1012, note 43; *Evans* v. *Faircloth-Byrd Mercantile Co.*, 165 Ala. 176, 21 Ann. Cas. 1164, 51 South. 785; *Tebbets* v. *Fidelity etc. Co.*, 155 Cal. 137, 99 Pac. 501; *Grubbs* v. *Nixon*, 93 Ark. 79, 137 Am. St. Rep. 78, 123 S. W. 785; *Holmquist* v. *Gilbert*, 41 Colo. 113, 14 L. R. A. (n. s.) 479, 92 Pac. 232; *Scott* v. *Bay City*, 150 Mich. 694, 114 N. W. 675; *Brereton* v. *Benedict*, 41 Colo. 16, 92 Pac. 238; *Foot* v. *Burr*, 41 Colo. 192, 13 L. R. A.

(n. s.) 1210, 92 Pac. 236; *Mountain Water Works Cons. Co.* v. *Holme*, 49 Colo. 412, 113 Pac. 501; *Zeno* v. *Adoue*, 54 Tex. Civ. App. 36, 117 S. W. 1039; *State* v. *District Court*, 38 Mont. 415, 100 Pac. 207; *In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 791.) A waiver of the effect of the bar of the statute may be accomplished by an express agreement to that effect, or by a new promise, or part payment. (25 Cyc. 1012, notes 45, 46.) The general rule is that statutes of limitation may be waived by agreement for a definite or limited time, or for an indefinite or unlimited time, and this whether the waiver is made contemporaneously with and as a part of the original transaction in controversy, or subsequently thereto. (25 Cyc. 1014, notes 54-57; *Wells Fargo & Co.* v. *Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439; *State Loan & T. Co.* v. *Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Smith* v. *Lawrence*, 38 Cal. 24, 99 Am. Dec. 344.)

Defendant's affirmative defense attempting to allege mutual mistake is fatally defective, and therefore demurrable, in the following particulars:

1. It fails to allege that a demand to correct the alleged mistake was made upon plaintiff, and that plaintiff refused to correct it; and does not allege any good reason or excuse for failure to make such demand. (34 Cyc. 944, note 28.)

2. It affirmatively shows that defendant was guilty of laches in unreasonably delaying to bring his action to reform the note, and fails to show any good excuse for such delay. (34 Cyc. 966, 967; 16 Cyc. 236.)

3. It is not alleged or shown that the insertion of the clause in question has caused any damage or prejudice, or will cause any to defendant, or that it in any way affects the substance of the contract itself, or the cause of action of plaintiff arising out of same. (25 Cyc. 998, and cases cited in note 73.) Equity will not correct a written contract on the ground of mistake, unless it appears that the party against whom the correction is sought is designing to take advantage of the mistake. (*Brainerd* v. *Arnold*, 27 Conn. 617.) There is no necessity for reformation where the legal construction put on the instrument would

be the same as before reformation. (34 Cyc. 946, and cases cited in note 47.)

4. Defendant fails to allege or show any wrong on the part of plaintiff, or any failure of plaintiff to perform his full duty toward defendant, or any knowledge of the so-called mistake by plaintiff; and it appears on the face of the second defense that the defendant is asking the aid of a court of equity to assist him in correcting a so-called mistake thirteen years after it was made, so as to be able to plead the statute of limitations against the plaintiff's cause of action, without offering to do any equity whatsoever on his part. While it is true that equity will relieve against the consequences of a mistake of fact, where the mistake is mutual, yet where the opportunities for information have been on both sides equal, and there has been no concealment by one of facts which the other was entitled to know, and where both have acted in good faith, there can be no relief. (16 Cyc 68, 69, note 7.) Its jurisdiction is exercised only in furtherance of justice, and relief will not be given against an equal or a superior equity, or unless the parties can be placed *in statu quo*. (16 Cyc. 69, notes 8–10.)

5. It fails to allege or show that defendant was not guilty of negligence, by reason of which the alleged mistake occurred; on the contrary, it affirmatively shows that defendant was guilty of negligence in not reading said note before signing it, and does not allege or show any good reason or excuse for his not reading it. A party will not be given relief against a mistake induced by his own negligence, as where he has failed to avail himself of means of knowledge of the facts. (16 Cyc. 69, notes 11, 12.) The maker of a note, who could read, but is so negligent as not to inform himself of the contents thereof, cannot defend same in the hands of a *bona fide* holder. (*Cedar Rapids Nat. Bank* v. *Rhodes*, 96 Miss. 700, 51 South. 717.) That one party has failed to notice a stipulation contained in an instrument, which was not induced by fraud or misrepresentation on behalf of the other contracting party, is no ground for relief. (34 Cyc. 918, note 88.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On December 26, 1897, the defendant executed and delivered to the plaintiff the following promissory note:

"$9,663.50. Helena, Montana, December 26, 1897.

"One year after date I promise to pay to Henry M. Parchen, or order, the sum of nine thousand six hundred and sixty-three and 50/100 dollars, for value received, together with interest thereon at the rate of ten per cent per annum from date until paid; and further agree that in the event of a suit to enforce the collection of this note a reasonable counsel fee, to be fixed and determined by the court, shall be added to and form a part of the judgment as damages. All rights and benefits conferred by the statute of limitations are expressly waived; it being expressly agreed that suit may be maintained to enforce collection hereof at any time after maturity, the provisions of the statute of limitations notwithstanding.

"WM. A. CHESSMAN."

On November 26, 1902, a payment of $5,000 was made thereon, leaving a balance of $9,414.70. On March 11, 1911, plaintiff brought this action to recover this balance, with interest. The defendant answered, alleging several special defenses, *viz.:* (1) That plaintiff's cause of action is barred by the limitation of eight years prescribed by section 6445 of the Revised Codes. (2) That on December 26, 1893, the defendant, having become liable to the plaintiff in the sum of $12,821.28, executed and delivered to the plaintiff his promissory note therefor due one year after date, to bear interest at the rate of ten per cent per annum; that renewals of this note were thereafter made from time to time until December 26, 1897; that on that date he executed the note in suit for the balance then remaining due; payments having in the meantime been made; that this note was intended, as a renewal *pro tanto* of the prior note; that it was intended by both plaintiff and defendant that it should be in the same form and of the same tenor as the original and prior renewal notes; that it was prepared by a scrivener who, by mis-

take, made use of a printed form containing the clause reciting the agreement that defendant expressly waives "all rights and benefits conferred by the statute of limitations," *etc.;* that none of the prior renewal notes contained this clause; that it was not the understanding or agreement or intention of the plaintiff and defendant that the clause referred to should be included in the note, but that, on the contrary, it was the understanding and agreement that the note should be of the same form, tenor and effect as all the former renewal notes, and should contain no other, further, or different obligations or promises; that defendant, believing that the note had been drawn in conformity with the understanding between himself and the plaintiff, and fully relying on the existence of such fact at the time of signing the note, signed the same when presented by the scrivener, without reading it; that, if he had been advised that the note contained the clause referred to, he would not have signed it; that immediately after it was signed it was delivered to the plaintiff, and has never since been in the possession of the defendant nor seen by him; that the defendant had no knowledge that the clause had been inserted therein until the plaintiff's complaint was served on him in this cause; that the preparation of the note was the personal act of the scrivener who, by his own mistake, included the said clause therein, without the knowledge or consent of either the plaintiff or the defendant, and contrary to their understanding and agreement, and that no demand was ever made by plaintiff upon the defendant that the said note should contain any agreement touching the statute of limitations. The prayer demanded that the note be reformed by striking therefrom the clause in question, and that plaintiff's cause of action be declared barred by the statute *supra.* (3) After a recital of substantially all the foregoing facts, it is further alleged that neither prior to the time of the execution of the note nor at that time, nor thereafter, did any consideration pass from the plaintiff to the defendant, nor was any received by the defendant, or by any person in his behalf, on account of which he agreed to incorporate in said note the clause referred to; that the minds of plaintiff and defendant never met so as to

constitute said clause a contract between them; and that said clause was and is without consideration, and of no binding force and effect. Demand was made that the clause be held void, and that plaintiff's cause of action be declared barred by the statute. (4) It is further alleged that the clause in question is itself barred by the statute. To these several defenses, the plaintiff interposed general demurrers, which were sustained, and, defendant declining to plead further, the court rendered judgment for the plaintiff for the full amount of the balance due, together with costs, including an attorney's fee. Defendant has appealed.

1. The first contention made by counsel presents the question —a new one in this state—whether such an agreement as that embodied in the note in suit is void because against public policy. If this contention can be maintained, of course the agreement was not effective for any purpose, and, though the note was renewed by the payment made on November 26, 1902 (Rev. Codes, sec. 6472), the statute began to run again from that date, and the right to recover was fully barred when this action was commenced.

Can it be said that the agreement contravenes the public policy of this state? What is the public policy of a state, and what [1] is contrary to it, are questions to be determined, not by the private convictions or notions of the persons who happen for the time to be exercising judicial functions, but by reference to the enactments of the law-making power, and, in the absence of them, to the decisions of the courts. And when the legislature, exercising its constitutional powers, has spoken upon a particular subject, its utterance is the public policy of the state on that subject. (*MacGinniss* v. *Boston & Mont. etc. Co.*, 29 Mont. 428, 75 Pac. 89; *Vidal* v. *Philadelphia*, 2 How. (U. S.) 127, 11 L. Ed. 205; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. Rep. 540.) As to what is the policy of the law on the subject of the statute of limitations in this state in our opinion is clearly determined by [2] legislative utterance. Section 6475 of the Revised Codes declares: "The objection that the action was not commenced

within the time limited can be taken only by answer. The corresponding objection to a defense or counterclaim can be taken only by reply except where a reply is not required, in order to enable the plaintiff to raise an issue of fact, upon an allegation contained in the answer." If this provision is to be assigned the meaning which its language clearly imports, the legislature has left it entirely optional with the party against whom a cause of action is alleged to avail himself of the protection of the statute or to forbear it; in other words, it has provided solely for the benefit of one who occupied the position of a defendant, as well as that of the plaintiff when the necessity arises for him to make defense to a counterclaim interposed by the defendant—a defense which he may invoke if he chooses. If he omits to invoke it at the proper time and in the proper way, it does not avail him under any circumstances, even though it appears incidentally that the cause of action alleged against him is completely barred. (*Grogan* v. *Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211; *American Min. Co.* v. *Basin & Bay State Min. Co.*, 39 Mont. 476, 24 L. R. A. (n. s.) 305, 104 Pac. 525; *Cullen* v. *Western etc. Title Co.*, 47 Mont. 513, 134 Pac. 302.) It is of no concern to the court or to the public that this is so, whether the omission is the result of oversight or of a prior agreement with the adversary party.

If this is the correct theory—and we are satisfied that it is—section 6181 of the Revised Codes is express authority for the [3] proposition that a party may waive the benefit of the statute before or after the expiration of the prescribed limit, not only by either of the acts mentioned in section 6472, *supra*, but also by express agreement based upon a consideration, though made contemporaneously with, and as a part of, the principal agreement or obligation out of which the action has arisen. This section provides: "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." This provision does not prescribe the time when nor the mode by which the waiver may be made effective, nor does it impose any restriction or limitation upon the right of waiver. It must

therefore be assumed that the party desiring to waive his right is free to do so in any way and at any time he chooses.

When we come to examine the decisions in other jurisdictions, we find them at variance with regard to the policy of the law upon the subject of waiver by contract. In Kentucky it is held that such a contract is against public policy and void. (*Moxley* v. *Ragan*, 10 Bush (Ky.), 156, 19 Am. Rep. 61; *Wright* v. *Gardner*, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116; *Union Cent. Life Ins. Co.* v. *Spinks*, 119 Ky. 261, 7 Ann. Cas. 913, 69 L. R. A. 264, 83 S. W. 615, 84 S. W. 1160.) In a later decision by the same court, however, an agreement in a contract of fire insurance limiting the time within which an action may be brought thereon to a period less than that provided by the statute is held valid. (*Smith* v. *Herd*, 110 Ky. 56, 60 S. W. 841, 1121.) The rule announced in the first three cases cited is approved generally by the courts of Mississippi, Tennessee, Maine, Texas and New York. (*Crane* v. *French*, 38 Miss. 503; *Mills* v. *Bennett*, 94 Tenn. 651, 45 Am. St. Rep. 763, 30 S. W. 748; *Moore* v. *Taylor*, 2 Tenn. Ch. App. 556; *Trask* v. *Weeks*, 81 Me. 325, 17 Atl. 162; *Smith* v. *Gillette*, 59 Tex. 86; *Shapley* v. *Abbott*, 42 N. Y. 443, 1 Am. Rep. 548; *Mutual Life Ins. Co.* v. *United States etc. Co.*, 82 Misc. Rep. 632, 144 N. Y. Supp. 476.)

While expressing a doubt that an agreement made as a part of the original contract, or a subsequent agreement to waive the statute for all time, is valid, the supreme court of California has decided that an agreement for an extension for a definite or reasonable time is valid. (*Wells Fargo & Co.* v. *Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439; *State Loan etc. Co.* v. *Cochran*, 130 Cal. 245, 62 Pac. 466, 600.) The same conclusion is announced by the courts of Missouri, Vermont, New Jersey and South Carolina. (*Bridges* v. *Stephens*, 132 Mo. 524, 34 S. W. 555; *Lyndon Savings Bank* v. *International Co.*, 78 Vt. 169, 112 Am. St. Rep. 900, 62 Atl. 50; *Quick* v. *Corlies*, 39 N. J. L. 11; *Lowry* v. *Dubose*, 2 Bail. (S. C.) 425.)

The supreme court of the United States (*Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. (U. S.) 386, 19 L. Ed. 257) has declared that a stipulation in a policy of fire insurance limiting

the time within which suit may be brought to a period shorter than that prescribed by the statute is not invalid as against public policy, and will be enforced as any other agreement. If such an agreement does not contravene public policy, it is difficult to understand how an agreement by which the prescribed period is extended, or by which the benefit of the statute is waived for a definite time, or for all time, is not valid. The one as effectually sets aside the statute as does the other, and, if the one is valid, no reason can be suggested why the other is not also. Recognizing this as the logical conclusion from the premise that a waiver of the protection of the statute by agreement is not against public policy, the courts of Vermont and New Jersey both hold that the agreement may be made a part of the original contract, or during the statutory period, and that when once made it is continuous, unless by its terms it is limited to a specified time. (*State Trust Co.* v. *Sheldon*, 68 Vt. 259, 35 Atl. 177; *Lyndon Savings Bank* v. *International Co., supra; Quick* v. *Corlies, supra.*) In these cases the agreement of waiver was upheld on the ground that defendant, having received the benefit of it, was estopped to repudiate it. It seems to us that, if such an agreement is enforceable at all, it is upon the broad principle that it has been so agreed by the parties. Be this as it may, the result reached by these cases is the logical one, once the premise is admitted that such agreements do not contravene public policy.

We are not required in this case to determine definitely whether by the agreement in controversy herein the defendant bound himself to refrain from pleading the statute for all time, or whether he bound himself for a reasonable time only, *viz.*: Until the expiration of an additional period of eight years after the expiration of that prescribed by the statute. Nothing appearing to overcome the presumption that a sufficient consideration passed to the defendant at the time the agreement was made (Rev. Codes, sec. 5010), the action commenced within three and one-half months of the expiration of the statutory limit was, upon either theory, commenced in time. Plaintiff's demurrer to this defense was properly sustained. For the same reason

the demurrer to the fourth defense was properly sustained, for, if the defendant became bound by the agreement at all, he waived his right to rely upon the statute for the full period of eight years from the date at which the cause of action would otherwise have been fully barred, *viz.*: Eight years after November 26, 1910.

2. The second defense alleged is not a model pleading; but we think it states a *prima facie* case of mutual mistake, and hence [4] is sufficient to require a reply by plaintiff. It is true that the defendant was guilty of negligence in failing to read the note before he signed it. (Rev. Codes, sec. 4983.) But if the facts alleged are accepted as true, the plaintiff was not himself free from negligence. The purpose of the parties, as shown by the allegations of the answer, was to renew a note which had been renewed from year to year since December 26, 1893, by substituting therefor one of the same form and tenor. None of the renewal notes had contained the objectionable clause. It was, moreover, the understanding of the parties that the new note should be changed only so far as to effect a change in the date of payment to a year later. If this was the fact—and for present purposes we must assume that it was—the mistake was mutual, and the new note as drawn by the scrivener did not represent the contract as actually made. If the parties to a contract agree upon terms and conditions named by them, and through mistake the writing embodying the agreement signed by them, or either of them, fails to express the agreement as made, or includes therein terms and conditions not agreed upon, the result is that there is no contract between them. Under such circumstances a court of equity will reform the written evidence of the contract so as to make it express the terms of the agreement as actually fixed by the parties. The rule thus stated was recognized by this court in *Fitschen* v. *Thomas*, 9 Mont. 52, 22 Pac. 450, and applied in *American Min. Co., Ltd.*, v. *Basin & Bay State Min. Co., supra.* The facts alleged bring the case within the principle of the latter case. If nothing else [5] appears, the fact that the party seeking reformation of the contract failed to read it before signing it will preclude relief;

but negligence in this behalf may be excusable under some circumstances. Otherwise no case could arise in which relief could be granted if the party asking it should appear to be open to the imputation of negligence in any degree.

The term "mistake" involves the conception that he to whom the fault expressed by it is imputed has been guilty of some degree of negligence which may or may not be excusable when viewed in the light of the circumstances of the particular case. Courts of equity are not bound by cast-iron rules. The rules by which they are governed are flexible and adapt themselves to the exigencies of the particular case. Relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. So [6] it is held generally that where the parties intrust the duty of formulating a writing embodying their agreement to an attorney or scrivener, and he, by his own mistake or fraud, embodies in it stipulations and conditions other than those agreed upon, the party against whom it is sought to be enforced may have it reformed, though it was signed by him and delivered to the other party, without reading. (*Moore* v. *Copp*, 119 Cal. 429, 51 Pac. 630; *Kilmer* v. *Smith*, 77 N. Y. 226, 33 Am. Rep. 613; *Albany City Savings Inst.* v. *Burdick*, 87 N. Y. 40; *Palmer* v. *Hartford Ins. Co.*, 54 Conn. 488, 9 Atl. 248; *Smelser* v. *Pugh*, 29 Ind. App. 614, 64 N. E. 943; *Story* v. *Gammell*, 68 Neb. 709, 94 N. W. 982; *Taylor* v. *Glens Falls Ins. Co.*, 44 Fla. 273, 32 South. 887; *Silbar* v. *Ryder*, 63 Wis. 106, 23 N. W. 106; *Greene Bay etc. Canal Co.* v. *Hewitt*, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.)

The case of *Hennessy* v. *Holmes*, 46 Mont. 89, 125 Pac. 132, has been understood to declare the rule that a failure by one of the parties to read a contract before signing it, when he has had full opportunity to acquaint himself with its contents, and there has been no fraud or misrepresentation by the other party, is such negligence as will preclude relief, without regard to the attendant circumstances. So understood, the decision unduly restricts the scope of the rule, though it is fully sustained by the authorities cited. In so far as it conflicts with the views herein

expressed, it is to be deemed overruled. As stated before, the term "mistake" carries with it the idea of fault in him to whom the mistake is imputed. The allegation of mutual mistake imputes negligence to both parties, and this mutuality is the basis of the rule of relief on the ground of mistake. To apply the rule in all its rigidity as it is understood to be declared by the *Holmes Case* would preclude relief in any case, even though the mistake is mutual, and the circumstances are such as to excuse the negligence of the complaining party.

Nor do we think that under the circumstances the defendant [7, 8] is open to the imputation of laches because he did not seek to have the note reformed earlier. It appears that, after it was delivered to the plaintiff, defendant did not see it, or know that it included the agreement in question, until the present action was brought. If this is true, he had, up to that time, been justified in resting upon the assumption that the note had been drawn in accordance with the understanding and agreement had at the time it was executed. Since it had been in the possession of the plaintiff, and had not been seen by the defendant, the latter could have had no knowledge that the mistake had been made until he ascertained the fact from the copy of the complaint served upon him. *Prima facie* this was sufficient to excuse his delay, for he was not required to act until he discovered that a mistake had been made. In any event mere delay is not sufficient ground for the imputation of laches. (*Wright* v. *Brooks*, 47 Mont. 99, 130 Pac. 968.)

Nor is the defendant to be denied relief because he does not [9] allege a previous demand upon plaintiff to correct the mistake. If he had no knowledge of the mistake, how could he make a demand for its correction? By commencing the action, the plaintiff manifested his intention to enforce the contract as written. A demand by defendant before filing his answer would have been an idle ceremony. "The law neither does nor requires idle acts." (Rev. Codes, sec. 6200.) The demurrer to this defense should have been overruled.

3. It is contended by counsel for defendant that the court was in error in sustaining the demurrer to the third defense, be-

cause, upon the facts stated, the agreement in question was [10] without consideration. The argument proceeds upon the assumption that the agreement was wholly independent of the note, and must have been made upon a consideration other than that of the note itself. Counsel cite some cases which consider such independent agreements, as, for instance, a verbal promise not to plead the statute, or an indorsement upon the note itself pending the running of the statute. Such an agreement, of course, is not enforceable if not supported by an independent consideration. (*Kellogg* v. *Dickinson*, 147 Mass. 432, 1 L. R. A. 346, 18 N. E. 223; *Shapley* v. *Abbott, supra; Green* v. *Coos Bay Wagon Road Co.* (C. C.), 23 Fed. 67, 10 Saw. 625.) On this point it is sufficient to say that, if the agreement was the result of a mutual mistake of the parties, it ought to be eliminated from the contract. If it was not incorporated therein by mistake, then the pre-existing indebtedness was a sufficient consideration for the entire contract. We know of no rule by which a party may select out of a contract one stipulation and avoid it by showing that it is not founded upon a consideration, while admitting that the contract is otherwise unobjectionable. The demurrer to this defense was properly sustained.

The judgment is reversed, with directions to the district court to overrule the demurrer to the second defense.

Reversed, with directions.

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY concurring specially:

I concur fully in the result reached. In my judgment, however, there should be omitted from the opinion the sentence: "If nothing else appears, the fact that the party seeking reformation of the contract failed to read it before signing it, will preclude relief." It is apt to mislead. To illustrate my meaning: If in the instant case the waiver clause was inserted in this note by mutual mistake, then the note sued upon does not represent the agreement of the parties and is not, in contemplation of law, a contract at all, because it lacks the indispensable ingredi-

ent—a meeting of the minds. If the note sued upon is not valid for want of that element, no negligence of defendant Chessman, however gross, can supply it or entitled plaintiff to recover for the breach of an agreement which never existed.

Rehearing denied July 16, 1914.

RULE, APPELLANT, *v.* BUTORI ET AL., RESPONDENTS.

(No. 3,392.)

(Submitted May 29, 1914. Decided June 16, 1914.)

[141 Pac. 672.]

Actions—Failure to Enter Judgment—Dismissal—When Error—Discretion.

Dismissal of Action—Failure to Enter Judgment—Statutes.

1. Section 6714, subdivision 6, Revised Codes, mandatory in character, providing that an action may be dismissed when the party entitled to judgment neglects to have it entered for more than six months, requires dismissal of an action, not when the party simply fails (without fault on his part) to act within time, but only when he is guilty of negligence in not acting.

[As to dismissal or nonsuit regarded as *res adjudicata*, see note in 49 Am. St. Rep. 831.]

Same—Mandatory Statute—Discretion.

2. The fact that a statute is mandatory in requiring the district court to do a thing, under certain conditions, in the disposition of a cause, does not deprive it of discretion in determining whether a given case falls within the statute.

Same—When Error.

3. Where neither the party entitled to judgment nor his attorney, both of whom were nonresidents, knew that a decision had been rendered until after the expiration of six months, and the clerk of court not only failed in his duty to notify counsel thereof as required by a custom prevailing in his court, which was relied on by the latter, but neglected to obey the court's specific order in that regard, failure to have judgment entered within time was not cause for dismissal of the action under subdivision 6, section 6714, Revised Codes.

Appeal from District Court, Jefferson County; J. B. Poindexter, Judge.

ACTION by J. H. Rule against Frank Butori and others. Judgment for plaintiff. From an order dismissing the action because judgment was not entered in time, plaintiff appeals. Reversed.

Messrs. Walsh, Nolan & Scallon, for Appellant, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

Mr. J. L. Wines and *Mr. T. J. Harrington* submitted a brief in behalf of Respondents.

MR. JUSTICE SANNER delivered the opinion of the court.

On December 10, 1910, it was agreed by counsel that this cause, then pending in the district court of Jefferson county, should be submitted for determination by the court without a jury upon an agreed statement of facts; the agreed statement was thereupon prepared and filed and an order entered granting seventy-four days in all for the filing of briefs; by further agreement of counsel this time was so extended that more than six months elapsed before briefs were filed and the cause actually submitted; on June 12, 1912, the court made findings for the plaintiff and ordered that judgment be entered accordingly; on March 24, 1913, a formal written judgment prepared by plaintiff's counsel was entered by the clerk; notice of entry of such judgment was given forthwith; and on April 12, 1913, defendants filed their motion to set aside the judgment and to dismiss the cause, for the reason that the judgment had not been entered within six months after the submission of the cause or within six months after the filing of the court's decision; this motion came on for hearing, and upon the hearing certain facts were made to appear explanatory of plaintiff's failure to have the judgment entered, but notwithstanding these the court entered an order sustaining the motion, vacating the judgment, and dismissing the action. From that order this appeal is taken.

The foundation of the order in question is, of course, subdivision 6 of section 6714, Revised Codes, which provides as fol-

[1] lows: "An action may be dismissed: * * * (6) By the court, when after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months."

Upon the present record but two hypotheses are available in justification of the order: Either (a) the mere lapse of six months after verdict or final submission commands a dismissal of the action without regard to any excusatory showing that may be made, or (b) the showing made was not sufficient.

(a) The provision referred to has been applied by this court on four different occasions: *Franzman* v. *Davies,* 32 Mont. 251, 80 Pac. 251; *State ex rel. Stiefel* v. *District Court,* 37 Mont. 298, 96 Pac. 337; *Pullen* v. *City of Butte,* 45 Mont. 46, 121 Pac. 878; and *State ex rel. Kohl* v. *District Court,* 46 Mont. 348, 128 Pac. 582. Only one of these, however—the *Stiefel Case*—can be claimed as lending any support to the lapse of time theory, and that by virtue of the following language to be found therein: "But we do not concede that this was a matter addressed to the discretion of the trial court. In our opinion, section 1004, subdivision 6, is mandatory. * * * At the expiration of six months from the time his default was entered, Stiefel had a right to have the action dismissed as against him, for failure of plaintiff to demand and have entered a judgment."

This language is to be considered in connection with the circumstances under which it was uttered, *viz.,* an intentional omission to have the judgment entered. We repeat now that, in the provision referred to, "may" means "must"; and, when a case presented is within this provision, the court has no power to relieve from it, or to say that it shall not be applied. But the [2] fact that a statute is mandatory does not deprive the courts of all judicial faculty to determine whether the case presented is within such statute. Discretion in that sense always exists. What, then, are the circumstances under which the action must be dismissed by the court? They are, not when the party entitled to judgment *fails* to demand and have it entered within six months after submission or verdict, but when he

neglects so to do. The choice of the verb "neglects" cannot be regarded as accidental, for it is not the policy of our law that a party shall suffer who is without fault, and the provision appears to have been taken from California, where, prior to its adoption in this state, a fixed construction had been placed upon it with reference to this very word. In *Gardner* v. *Tatum*, 77 Cal. 458, 19 Pac. 879, decided in 1888, the court said: "We nevertheless think that the refusal to dismiss the action was proper under the circumstances. The rule established by the statute applies to cases where the party has been guilty of negligence. * * * If the plaintiff was guilty of any negligence, * * * it was of such a slight character as not to bring him within the scope of the provision." Again, in *Jones* v. *Chalfant*, 3 Cal. Unrep. 585, 31 Pac. 257, decided in 1892: "In view of the action of the court, it will be presumed, therefore, that the failure to enter the judgment was the result of the negligence of the clerk, and not of the defendant. It follows that the judgment and order should be affirmed." And again, in *Marshall* v. *Taylor*, 97 Cal. 422, 32 Pac. 515, decided in 1893: "This section is not mandatory, * * * and, if it were, would not authorize a dismissal of the action under the circumstances shown in this case, because there was no 'neglect' on the part of plaintiff." An intimation of this as the correct construction of the statute was furnished by *Pullen* v. *City of Butte, supra,* in which this court said: "It is not difficult to see why an action should be dismissed when the plaintiff neglects for more than six months to have judgment entered on a verdict in his favor. The reason is that it is the policy of the law to put a speedy end to litigation, and, under such circumstances, a plaintiff may fairly be deemed to have abandoned the fruits of his victory." It goes without saying that an abandonment of the fruits of his victory could not be imputed to one who did not know of his victory and whose failure was unintentional and excusable.

(b) The transcript discloses that the plaintiff resided at Basin
[3] and his attorneys at Helena; that, when the decision was

rendered, none of the attorneys for either party were in court; that plaintiff's attorneys were not in the habit of attending court in Jefferson county except when legal matters in which they were concerned were set for consideration, and they were not advised that the cause at bar would be considered or determined by the court on June 12, 1912; that neither party nor any of the attorneys had knowledge or information of the decision, the first intimation thereof secured by the plaintiff or his attorneys coming on March 20, 1913, in response to a communication addressed by plaintiff's attorneys to the judge, asking when the cause would be decided; that plaintiff's attorneys then ascertained from the clerk when such decision had been rendered, and caused the judgment to be entered and notice of such entry to be served upon defendants' counsel; that the service of said notice gave to defendants' counsel their first information that a decision had been rendered in said cause; that a custom prevailed in the district court of Jefferson county, for the clerk, in causes in which counsel were nonresidents and were not in court, to promptly notify counsel by mail of the determination of matters in which they were concerned, and plaintiff's counsel, relying on said custom, expected that, if a decision in said cause was rendered in their absence, such notification would be given them; that, when such decision was rendered, the clerk was expressly directed by the court to notify all the counsel concerned, but the clerk failed to give any notice to any of such counsel notwithstanding such custom and order. We think this showing was sufficient. The custom referred to was part of the orderly procedure of court; by it, as well as by specific order, a duty was imposed upon the clerk. The neglect was his, and through his neglect all the parties were kept in ignorance of what had been done. The circumstances altogether fail to warrant the imputation that the plaintiff intended to abandon the fruits of his victory, and a decent respect for the dignity of the court having the cause under advisement excused his delay in making inquiry. He had a right to rely upon the assumption that the clerk would do his duty, and he cannot be charged with

neglect because the clerk failed in that regard. (*Gardner* v. *Tatum, supra; Jones* v. *Chalfant, supra.*)

The order appealed from is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

FLYNN, APPELLANT, *v.* BEAVERHEAD COUNTY, RESPONDENT.

(No. 3,393.)

(Submitted May 29, 1914. Decided June 17, 1914.)

[141 Pac. 673.]

Ejectment—Eminent Domain—Compensation—Counties—Highways—How Discontinued.

Eminent Domain—Payment—Condition Precedent.

1. Under section 14, Article III, of the Constitution, payment or tender of the amount ascertained to be due in the manner provided by law for private property intended to be taken for a public use, is a condition precedent to the acquisition of any right therein by the public.

[As to damages or injuries for which compensation must be made, see notes in 31 Am. Dec. 373; 88 Am. Dec. 113; 4 Am. St. Rep. 399; 9 Am. St. Rep. 144; 19 Am. St. Rep. 459; 22 Am. St. Rep. 50; 35 Am. St. Rep. 291.]

Same—Ejectment—Municipal Corporations.

2. Ejectment lies in favor of the owner of land taken under eminent domain without payment or tender of just compensation ascertained as prescribed by law, and the fact that the wrongdoer is a municipal corporation is immaterial, it being answerable the same as a private citizen under the same circumstances.

Same—Highways—How Discontinued.

3. Where a public road had been established at public expense in strict conformity with statutory provisions and with plaintiff's consent relinquishing compensation so far as said road ran through his land, it had, under section 1338, Revised Codes, to remain such until abandoned as therein provided, and the failure of the county commissioners to comply with conditions attached to plaintiff's consent, did not clothe him with the right to maintain ejectment against the county.

Appeal from District Court, Beaverhead County; Wm. A. Clark, Judge.

ACTION by Thomas Flynn against Beaverhead County. From a judgment of nonsuit plaintiff appeals. Affirmed.

Messrs. Norris, Hurd & Smith, for Appellant, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

Under the facts in this case, ejectment is the proper remedy. The case of *Armstrong* v. *City of St. Louis*, 69 Mo. 309, 33 Am. Rep. 499, is the leading case on this subject. It holds that ejectment will lie against a city to recover land which the city had wrongfully taken and converted into a street. In the case of *McCarty* v. *Clark County*, 101 Mo. 179, 14 S. W. 51, the supreme court of Missouri approves the *Armstrong Case* and says: "Ejectment will lie against a county the same as against a city to recover land which has been wrongfully taken and converted into a public road; the remedy being allowed in the one case, there is no good reason why it should be denied in the other." In the case of *Lawe* v. *City of Kaukauna*, 70 Wis. 306, 35 N. W. 561, the supreme court of Wisconsin says: "The defendant was in possession of parts of lots 7, 8 and 9 for the use of a swing-bridge across the canal and clearly intended to occupy and use the same in hostility to the plaintiff's title. Trespass would be an inadequate and vexatious remedy in such a case. The defendant claims the permanent and continued right to the possession of the lots for such purpose. Ejectment is the only adequate remedy in such case." (See, also, *Tuller* v. *City of Detroit*, 97 Mich. 597, 56 N. W. 1033; *Ewing* v. *City of St. Louis*, 5 Wall. 413, 18 L. Ed. 657.) The supreme court of California, in the case of *Barry* v. *Sonoma County*, 43 Cal. 217, considered an action of ejectment against the county for the recovery of land. The case was decided upon another point but the appeal would not have been entertained had not the court been of the opinion that the action in ejectment against the county would lie and was the appropriate remedy.

Mr. D. M. Kelly, Attorney General, *Mr. Wm. H. Poorman*, Assistant Attorney General, *Mr. Roy S. Stephenson*, and *Mr. H.*

G. Rodgers, for Respondent, submitted a brief; *Mr. Poorman* and *Mr. Rodgers* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action in ejectment. The complaint is in the usual form, alleging title and right of possession in plaintiff to certain lands described, and ouster therefrom by the defendant, to plaintiff's damage, *etc.* The answer consists of a denial of all the material allegations of the complaint, and matters alleged as affirmative defenses upon which issue was joined by reply. At the close of plaintiff's evidence the court granted the defendant a nonsuit and directed judgment in its favor for the costs of the action. The plaintiff has appealed.

The evidence discloses these facts: Some time prior to September 15, 1908, a number (more than ten) of the residents of defendant county and owners of land therein presented to the board of commissioners of the county a petition asking for the establishment of a new road from the vicinity in which their lands are situated to Dillon, the county seat. The proposed road, as described in the petition, was to extend through the lands of the plaintiff, and thence through adjoining lands owned by Mrs. R. A. Reynolds and others, so as to give the plaintiff an outlet toward Dillon more direct than was furnished by the old road or a new road established on any other line. It was recited that all the owners of lands through which the proposed road would pass consented to its establishment without cost to the county for right of way, except Mrs. Reynolds. It was asked that, upon the establishment of the proposed road, the old road should be abandoned. Mrs. Reynolds also signed the petition but attached, to the consent thus given, certain conditions as to fences, ditches, gates, *etc.*, along the right of way with which the county authorities should comply as compensation for the portion of her lands taken. Upon the presentation of the petition the board appointed viewers, who made their report. The report was approved. An order was thereupon made establishing the road as proposed, upon the condition that the

county was not to pay compensation to any of the petitioners for any portion of the right of way; the only expense being that of opening the road and putting it in condition for travel. The old road, which passed through other parts of the lands then owned by the plaintiff and others subsequently purchased by him, was ordered abandoned; plaintiff fencing the portions located on his lands. The record of the proceedings had by the board of commissioners at the time the petition was presented to and considered by it showed that the plaintiff had joined in the petition without any condition or reservation. He was permitted to testify that, when he signed the petition, he did so upon certain conditions expressed in a written communication to the board which was before it at the time the viewers were appointed and the order establishing the road was made; but that, upon a search of the files in the clerk's office for the original petition and communication, he had ascertained that both had been lost or destroyed. He was then permitted, over objection of counsel for defendant, to testify further as to what these conditions were, *viz.:* That the proposed road should extend from the line of his lands straight through Mrs. Reynolds' lands, and thence on a direct route to Dillon, and that the right of way through his lands should be inclosed by a fence constructed as described in the petition. He then stated: "The conditions imposed upon the board * * * with reference to this road, were never complied with. The conditions at the bottom set out that any failure to put a straight road through would make the agreement null and void. From time to time I tried to induce the board to comply with my conditions. Q. Did you ever intend to give the board, or give Beaverhead county, a right of way, unless such board accepted the conditions and fulfilled them? * * * A. No, sir. They accepted them, too, on the day they met. I was there when they met. They said they accepted my conditions. The board was in session at the time they accepted my conditions. They were meeting in the board room. * * * After the road reached the line of the Reynolds ranch, the board stopped work on it; they would not do anything further. I asked them why they would not put it through. They

said they could not because the conditions would not permit them to do it. That is the time that I served that notice that is now in evidence in this case."

It appears from other evidence that the work was stopped because the board was of the opinion that the expense of construction was too great. What change, if any, was made does not appear, but there is ground for the inference that the plaintiff can conveniently reach Dillon by traveling another road deviating somewhat from the line of the proposed road after it leaves his lands. About September 28, 1909, the plaintiff notified the board in writing that, unless the new road should be established and the old road closed up within sixty days, he would withdraw his "dedication and offer" to grant the right of way across his lands and "proceed to re-enter said proposed right of way and remove therefrom the fences that had been placed thereon, and to fully recover the use, possession, and enjoyment of said right of way and all thereof." After that date some construction work was done, but the extent of it does not appear. On September 7, 1911, the plaintiff presented to the board a claim against the county for the value of the land occupied by the road. On the following day he commenced an action against the county to recover the amount of this claim. This action was subsequently dismissed, and on November 22, 1912, the present action was commenced.

The question whether the court erred in admitting oral evidence as to the conditions upon which the plaintiff joined in the petition, thus supplementing the record of the proceedings had by the board, discussed by counsel in their brief, we do not think it necessary to decide. Conceding that the ruling was correct, and that the evidence establishes beyond question all that plaintiff's counsel claim, *viz.*, that the county acquired the right of way upon the express condition that the road should be constructed upon the line described in the petition and fenced as stated by plaintiff, the order of nonsuit was nevertheless properly granted. Section 14 of Article III of the Constitution declares: "Private property shall not be taken or damaged for public use without just compensation having first been made to

or paid into court for the owner." By force of this provision private property cannot be taken for a public use *in invitum*, except upon compensation first being made to the owner. In other
[1, 2] words, the payment or tender of compensation, the amount of which has been ascertained in the manner provided by law, is made a condition precedent to the acquisition of any right by the public. (*Mayor, etc.*, v. *Fitzpatrick*, 36 N. J. L. 120; Elliott on Roads and Streets, 3d ed., sec. 272.) Possession taken from the owner without compliance with this condition is wrongful, and ejectment will lie in favor of the owner to recover it. The fact that the wrongdoer is a municipal corporation does not affect the right to maintain the action. In contemplation of law the municipality has been guilty of a wrong for which it is answerable as a private citizen would be, under the same circumstances. (*Armstrong* v. *City of St. Louis*, 69 Mo. 309, 33 Am. Rep. 499; *Mayor, etc.*, v. *Fitzpatrick, supra*; *McCarty* v. *Clark County*, 101 Mo. 179, 14 S. W. 51; *Lawe* v. *City of Kaukauna*, 70 Wis. 306, 35 N. W. 561; *Tuller* v. *City of Detroit*, 97 Mich. 597, 56 N. W. 1033; *Strong* v. *City of Brooklyn*, 68 N. Y. 1; Elliott on Roads and Streets, *supra*.) The doctrine of these cases was recognized by this court in *Murray* v. *City of Butte*, 7 Mont. 61, 14 Pac. 656. If, therefore, there were no other consideration to be taken into account, we should, upon the assumption we have made as to the ruling of the court referred to above, hold that the plaintiff can maintain this action.

The road was opened by the consent of plaintiff. The pro-
[3] ceedings were admittedly in strict conformity with the provisions of the statute in force at the time the proceedings were had, which were the authority under which the board acted. (Rev. Codes, secs. 1390 *et seq.*) Now, let it be conceded that plaintiff, by giving his consent, did not forego his right to compensation in case the board failed to observe the conditions attached; nevertheless the road was opened at public expense. The right of the public to the use of it became vested. It thus became an established highway. Section 1338 of the Revised Codes declares: "All public highways once established must con-

tinue to be public highways until abandoned by the board of county commissioners of the county in which they are situated, or by operation of law, or judgment of a court of competent jurisdiction." None of these contingencies resulting in the closing of the road having occurred, it still remains a public highway, notwithstanding the commissioners did not observe the conditions upon which consent was given. This consideration alone, in our opinion, furnishes a conclusive reason why this action cannot be maintained. The county commissioners could have taken plaintiff's land without his consent; by paying full compensation, it is true (Rev. Codes, sec. 1398), but they could have taken it. Having taken and converted it into a highway, it must remain a highway, under the statute, *supra*, until it has ceased to be such by one of the means therein prescribed.

It is not meant by anything here said that the plaintiff is wholly without remedy. He may not thus be deprived of his land without full compensation for it. Upon the plainest principles of justice, the board of commissioners should ascertain the amount to which he is entitled and pay him. In the absence of favorable action on its part, he may maintain his action for it as he at first attempted to do. But in face of the provisions of the statute, *supra*, he cannot destroy the highway established according to law, through the medium of an action in ejectment.

The judgment is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

STATE, RESPONDENT, *v.* GROOM, APPELLANT.

(No. 3,397.)

(Submitted May 28, 1914. Decided June 17, 1914.)

[141 Pac. 858.]

Criminal Law—Jury—Challenge to Panel—Statutes—Substantial Compliance Necessary—Exception—Effect—Demurrer—Admissions—Evidence.

Criminal Law—Challenge to Jury Panel—Exception—Has Effect of Demurrer—Burden of Proof.

1. Where defendant, charged with crime, interposed a challenge to the jury panel because the sheriff had intentionally omitted to summon some of the jurors drawn by the jury commission, to which the state took an exception, the court erred in overruling the challenge on the ground that defendant had failed to sustain the burden of establishing the truth of his assertion, since by its exception (in effect a demurrer) the facts stood admitted by the state, and no burden rested upon defendant.

Same—Challenge to Jury Panel—Evidence—Sufficiency.

2. Evidence adduced on the trial of a challenge to the jury panel on the second ground of challenge provided by section 9247, Revised Codes, *i. e.*, the intentional omission of the sheriff to summon one or more of the jurors drawn, which omission was testified to by that officer as having been occasioned by his imperfect knowledge of county lines incident to the creation of a new county, *held* sufficient to warrant the court in sustaining the challenge.

Same—Statutes—Substantial Compliance Necessary.

3. While anything less than a substantial compliance with the statute relative to the drawing or returning of a jury is fatal, it is only a material departure from the law (Rev. Codes, sec. 9247) which may be made the basis of a challenge to the panel.

Appeal from District Court, Rosebud County; Geo. W. Pierson, Judge.

LYNN GROOM was convicted of a felony and appeals. Reversed and remanded.

Cause submitted on briefs of counsel.

Messrs. Loud, Collins, Brown, Campbell & Wood, for Appellant.

It has been held in Alabama, in the case of *Ezell* v. *State,* 102 Ala. 101, 15 South. 810, as follows: "The fact that the sheriff supposes or knows that a person whose name appears upon the

venire is exempt or disqualified as a juror does not excuse his failure to summon him, the questions of exemption and qualification being for the court." In *State* v. *Moore*, 120 N. C. 570, 26 S. E. 697, the erroneous action of the judge in determining the qualifications of jurors as the names were drawn from the jury-box was held to be ground for challenge to the array. The Texas court of appeals in the case of *Robles* v. *State*, 5 Tex. App. 346, has held: "The court has no power to excuse jurors summoned on a special venire until they have appeared at the time and place set forth in the *venire facias*." (See, also, *Thompson* v. *State*, 19 Tex. App. 593; *Smith* v. *State*, 133 Ala. 73, 31 South. 942.)

Section 9247, Revised Codes, was construed in the case of *State ex rel. Breen* v. *District Court*, 34 Mont. 107, 85 Pac. 870. Idaho has a similar statutory provision to the last clause of that section. In the case of *People* v. *Armstrong*, 2 Idaho, 298, 13 Pac. 342, the Idaho court held that the intentional omission of the sheriff to summon one juror was a good cause of challenge to the panel and the challenge should have been sustained.

We respectfully submit that under the principle of law announced by the authorities herein cited, the defendant was entitled as a matter of right to have had these jurors summoned and brought into court, in order that their qualifications to act as trial jurors could be judicially determined; that the motion to quash the venire should have been granted, and that it was error to deny this motion and compel the defendant to submit his case to a jury selected and summoned as the one in the case at bar.

Mr. D. M. Kelly, Attorney General, and *Mr. Chas. S. Wagner*, Assistant Attorney General, for Respondent.

The record discloses that the sheriff served every juror drawn found by him within his jurisdiction and omitted to serve only such as were not at the time residents of his county. The omission to serve such was not intentional upon the part of the sheriff, but was due to express instructions received by him

from the judge of the court. The omission was not an arbitrary one. He was advised by the court that certain persons, whose names were on the panel, would not be competent to serve if drawn, and the effect was that, by the action of the court, the panel was amended so as to exclude the names of incompetent men. The sheriff acted in entire good faith, without bias and without interest, without partiality or default, and did not willfully omit to serve any juror. The omission to serve certain persons, under these circumstances, was not such an intentional omission as is contemplated by the law. (24 Cyc. 328, and cases cited under notes 98 and 2, p. 329.) There is no contention in this case that the defendant was in any wise prejudiced by the action of the court in the premises, nor is there any contention that any person whose name was omitted would have been competent as juror had he been summoned and been present in court. The action of the court was at most an irregularity which was wholly excusable under the peculiar circumstances confronting the court at the time. We maintain that a venire, although a judicial process, is a mere precept to the sheriff, and is subject to the further orders of the court. (24 Cyc. 218, 219, 225, and cases cited under note 70, p. 224.) As indicated above, appellant does not complain that the action of the court or the action of the sheriff in this regard deprived him of a fair and impartial trial before a jury of the county wherein he was tried. Any error which may have been committed did not affect any substantial rights of appellant, and under the rule so often announced by this court, under section 9415, Revised Codes, appellant cannot be heard to complain.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

When this appellant was brought to trial in the district court of Rosebud county upon an information charging him with the [1] commission of a felony, he interposed a challenge to the jury panel upon the ground that the sheriff had intentionally omitted to summon twelve of the jurors drawn and whose names appeared upon the venire. Counsel for the state announced that

they excepted, and thereupon evidence was offered by the defendant in proof of the charge made, but at the conclusion the court overruled the challenge, and in doing so indicated that the ruling resulted from the defendant's failure to prove that any of the jurors, whom the sheriff had failed to serve, resided in Rosebud county and could have been served by the exercise of due diligence on the part of the sheriff.

The question presented upon this ruling is one of burden of proof. Section 6337, Revised Codes, defines the qualifications of jurors. Section 6342 provides a jury commission, consisting of the chairman of the board of county commissioners, the county treasurer, and the county assessor, to prepare a list of persons for jury service comprising the names of all persons listed upon the assessment-roll whom the commissioners believe to be competent and qualified as trial jurors. Section 6345 defines the duties of the clerk of the district court, and sections 6348, 6349, and 6350 provide the method to be employed in drawing a jury. Section 6356, as amended by the Laws of 1911, page 12, prescribes the duty of the sheriff and directs him as to the procedure in summoning a jury panel; and section 9247 reads as follows: "A challenge to the panel can be founded only on a material departure from law in respect to the drawing and return of the jury as in civil actions, or on the intentional omission of the sheriff to summon one or more of the jurors drawn."

Upon the record as made at the time the challenge was interposed, there was not any burden upon the defendant. The exception to the challenge is in effect a demurrer and admits all the facts stated to be true. (Sec. 9249, Rev. Codes; *People* v. *Armstrong*, 2 Idaho, 298, 13 Pac. 342; *State* v. *Tighe*, 27 Mont. 327, 71 Pac. 3.) Had the defendant stood upon his challenge, he would have been entitled to a favorable ruling, for the facts stated bring the case clearly within the provisions of section 9247, above. However, all parties apparently treated the exception as raising an issue of fact under section 9251, and, the defendant having adopted that theory, we will treat the matter as though an issue had been raised by a denial of the challenge.

It is one of the presumptions which is made to have the effect

[2] of evidence by statute in this state "that official duty has been regularly performed" (subd. 15, sec. 7962, Rev. Codes), so that, when the sheriff of Rosebud county received the venire for service, the presumption prevailed that every man whose name appeared upon it was competent for jury service, and defendant could rely upon the presumption to make out his *prima facie* case to that extent. Upon the evidence presented, there is not any controversy. The sheriff frankly confessed that he intentionally omitted to serve nine of the jurors drawn, and whose names appeared upon the venire delivered to him for service. In explanation of his conduct he testified that Judge Crum of the district court had advised his deputy that the sheriff's office need not serve anyone whose residence was in that territory formerly constituting a portion of Rosebud county but incorporated in Big Horn county after the jury was drawn. If the record disclosed that the sheriff followed Judge Crum's directions, doubtless this question would not be before us; but the sheriff was forced to admit that he did not know whether some of the jurors, whom he so intentionally omitted to serve, resided in the new county or were still residents of Rosebud county. In fact, he testified that he did not know where the line dividing the two counties ran, at least in certain localities. The evidence thus procured, aided by the presumption that the officials had regularly performed their duty in preparing the jury list and in drawing the jury, established the facts alleged in the challenge and entitled the defendant to a favorable ruling, in the absence of countervailing proof. If the sheriff could excuse his conduct (and upon this we express no opinion), the burden was upon him to do so, and not upon the defendant to prove the negative.

Section 9247 comprehends two separate grounds for a chal-
[3] lenge to the panel. First, material departure from the law in drawing or returning a jury. With respect to that ground this court has had occasion to comment frequently. It has been held uniformly that substantial compliance is required, and anything less will vitiate the work of procuring a jury. (*Dupont* v. *McAdow*, 6 Mont. 226, 9 Pac. 925; *State ex rel. Root*

v. *McHatton*, 10 Mont. 370, 25 Pac. 1046; *State* v. *Landry*, 29 Mont. 218, 74 Pac. 418.) But not every deviation, however slight, from the strict letter of the law in drawing or returning a jury will furnish ground for challenge to the panel. The statute in terms requires that the departure must be a material one. (*State* v. *Tighe*, above.)

The language of the second ground of challenge, as stated in the statute, is too plain to admit of construction. The section of the Code quoted declares that "the intentional omission of the sheriff to summon one or more of the jurors drawn" furnishes a sufficient ground for a successful challenge to the panel. If this statutory provision is wrong, the legislature is free to change it, but, so long as it remains a part of the law of this state, it is the duty of the courts to see that it is observed. It is not the business of the court to legislate by interpolating terms into this section under which the will of the lawmakers will be defeated. The right to challenge the jury panel for the intentional omission of the sheriff to serve one or more of the jurors drawn is but a legislative amplification of the constitutional guaranty that in every criminal prosecution the accused shall have the right to "a speedy, public trial by an impartial jury." If the sheriff may be permitted to summon only such veniremen as suits his whim or caprice, he can pack the jury in any given case as effectually as though the selection of the entire jury were left exclusively to him. Whatever merit there may be in the idea expressed in this ground of challenge, it is apparent at once that the legislature viewed the sheriff's opportunity to defeat the constitutional guaranty of an impartial jury as of so grave a character as to warrant and require that a panel from which he had intentionally omitted to serve one or more of the jurors drawn should be discharged if an accused person for trial before such panel raised the objection.

The trial court erred in imposing upon the defendant a burden unauthorized by law. The challenge to the panel should have been sustained, and, because it was not, the subsequent trial proceedings were null and void. Under these circumstances, we will not consider the other assignments.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE, RESPONDENT, *v.* MILLER ET AL., APPELLANTS.

(No. 3,390.)

(Submitted May 28, 1914. Decided June 17, 1914.)

[141 Pac. 860.]

(For syllabus, see *State* v. *Groom, ante,* p. 354.)

Appeal from District Court, Rosebud County; George Pierson, Judge.

ALFRED MILLER and Otto Peterson, convicted of crime, appealed from the judgment of conviction and an order denying them a new trial. Reversed and remanded.

Messrs. Loud, Collins, Brown, Campbell & Wood and *Mr. Braz D. Tull,* for Appellants, submitted a brief; *Mr. Chas. H. Loud* argued the cause orally.

Mr. D. M. Kelly, Attorney General, and *Mr. Chas. S. Wagner,* Assistant Attorney General, for Respondent, submitted a brief; *Mr. Wagner* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The facts in this case are identical with those presented upon the challenge to the panel in *State* v. *Groom, ante,* p. 354, 141 Pac. 858, just decided, and, upon the authority of that case, the judgment and order denying defendants a new trial are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE, RESPONDENT, v. HANSON, APPELLANT.

(No. 3,443.)

(Submitted June 22, 1914. Decided June 25, 1914.)

[141 Pac. 669.]

Criminal Law—Robbery—Attempt—Evidence—Insufficiency—Intent—Proof Required.

Robbery—Attempt—Evidence—Insufficiency.

1. Proof of an assault, without circumstances tending to show an intent to commit robbery, *held* insufficient to convict defendant of an attempt to commit the latter crime.

Same—Intent—Evidence.

2. Testimony of a witness that accused, charged with an attempt to rob, had solicited the witness some six days before the assault to join in committing robbery was too remote to supply the basis for an inference of the specific intent required, under section 8894, Revised Codes, to be present at the time of the alleged crime.

[As to the question of intent as an element of proof in larceny cases, see note in 88 Am. St. Rep. 600.]

Same.

3. While the intent with which an act is done may be inferred from the attendant circumstances, yet, when they are such as to furnish the basis for an inference of some intent other than that necessary to constitute the crime charged, or of the absence of any intent, a conviction of the crime charged cannot be sustained.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

HAROLD S. HANSON was convicted of an attempt to commit the crime of robbery, and appeals from the judgment and an order denying him a new trial. Reversed and remanded.

Mr. O. W. McConnell, for Appellant, submitted a brief and argued the cause orally.

The information filed against the defendant is insufficient and defective in the following particulars: It fails to allege any overt act. "Indictments for attempts to commit a crime must aver the intent and the overt act constituting the attempt." (*Hogan* v. *State,* 50 Fla. 86, 7 Ann. Cas. 139, 39 South. 464; *State* v. *Brannan,* 3 Nev. 238; 22 Cyc. 363; *People* v. *Kane,* 161 N. Y. 380, 55 N. E. 946.) "Although an attempt to commit a

crime involves both a criminal intent and an overt act, yet it is not enough to charge an attempt merely, but both the intent and the overt act must be specifically alleged." (*State* v. *Wilson,* 30 Conn. 500; *State* v. *Doran,* 99 Me. 329, 105 Am. St. Rep. 278, 59 Atl. 440; *State* v. *Frazier,* 53 Kan. 87, 42 Am. St. Rep. 274, 36 Pac. 58.) The federal courts have likewise construed the sufficiency of an indictment charging an attempt to commit a crime. Overt acts must be alleged and proved. (*United States* v. *Ford,* 34 Fed. 26.) The language of the statute used in an indictment must be accompanied with such a statement of facts as informs the accused of the specific offense with which he is charged. (*United States* v. *Hess,* 124 U. S. 483, 31 L. Ed. 516, 8 Sup. Ct. Rep. 571; *State* v. *Stimson,* 24 N. J. L. 9; *State* v. *Thatcher,* 35 N. J. L. 445.) In addition to the foregoing, there are many other authorities sustaining the proposition that in an information for an attempt to commit a crime, there must be alleged the overt act constituting the attempt. (See *State* v. *Colvin,* 90 N. C. 717; *State* v. *Brown,* 95 N. C. 685; *Commonwealth* v. *Peaslee,* 177 Mass. 267, 59 N. E. 55; *Hicks* v. *Commonwealth,* 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024; *Commonwealth* v. *Dean,* 109 Mass. 349; *People* v. *Thomas,* 63 Cal. 482.)

It fails to allege any assault. (McClain on Criminal Law, sec. 480, note 6, sec. 483; *State* v. *Brewer,* 53 Iowa, 735, 6 N. W. 62.) "In charging an attempt to commit larceny from the person, an assault must be alleged." So in charging an attempt to commit robbery, an assault must be alleged. (*Randolph* v. *Commonwealth,* 6 Serg. & R. (Pa.) 398.)

It fails to allege that the party had any personal property upon him. "An information for robbery which fails to allege the ownership of the property taken does not constitute a valid charge of assault with intent to commit robbery." (*People* v. *Ammerman,* 118 Cal. 23, 50 Pac. 15.) "The information must allege a present ability to carry the attempt into execution." (*State* v. *Bohn,* 19 Wash. 36, 52 Pac. 325.)

It fails to give any description or value of property. It is usual and customary in an information for robbery or for lar-

ceny to describe the particular things sought to be taken, and while the value thereof may be immaterial, some description thereof is necessary as advising the defendant with what he is charged of doing and informing the jury of the purpose the defendant was seeking to accomplish.

Mr. D. M. Kelly, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for the state, submitted a brief; *Mr. Wagner* argued the cause orally.

In *Jackson* v. *State*, 91 Ala. 55, 24 Am. St. Rep. 860, 8 South. 773, the doctrine is laid down that "an attempt" implies both an intent and actual effort to consummate the intent. Hence an indictment charging an "attempt" to commit larceny is sufficient without alleging the particular acts constituting the "attempt." (See, also, *People* v. *Moran*, 123 N. Y. 254, 20 Am. St. Rep. 732, 10 L. R. A. 109, 25 N. E. 412.) In *People* v. *Bush*, 4 Hill (N. Y.), 133, it is held that an attempt in any form to commit an offense is within the statute, and the particular manner in which the attempt was made need not be pointed out in the indictment, nor is it necessary to allege an assault. (See, also, *People* v. *Burns*, 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087.)

It is said that the information is bad because it fails to allege a description or value of the property attempted to be taken, and because it fails to allege that the prosecuting witness had any personal property upon him. No authorities are cited by counsel for appellant, but we take the liberty of citing *Clark* v. *State*, 86 Tenn. 511, 8 S. W. 145, where the precise points raised by appellant were considered by the Tennessee court, and it was held that such allegations are unnecessary in charging an attempt. (*State* v. *Utley*, 82 N. C. 556.)

As bearing generally upon the proposition as to whether or not the information states facts sufficient to constitute a public offense, see *State* v. *Paisley*, 36 Mont. 237, 92 Pac. 566; *State* v. *Clancy*, 20 Mont. 498, 52 Pac. 267; *State* v. *Mish*, 36 Mont. 168, 122 Am. St. Rep. 343, 92 Pac. 459; *State* v. *Pemberton*, 39 Mont. 530, 104 Pac. 556; sec. 9157, Rev. Codes.

The authorities seem to hold that to constitute an attempt, there must be more than mere preparation; there must be acts done with intent to commit a crime, but which fall short of its actual commission. (12 Cyc. 177.) Such is the purport of our Code provision (Rev. Codes 8894), but it is not necessary to show the last proximate act to the consummation of the crime in contemplation, for it is enough to prove acts apparently adopted to produce the result intended, provided more than mere preparation be shown. (*Glover* v. *Commonwealth*, 86 Va. 382, 10 S. E. 420; *Hicks* v. *Commonwealth*, 86 Va. 223, 10 Am. St. Rep. 891, 9 S. E. 1024; 12 Cyc. 178.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of an attempt to commit the crime of robbery upon the person of one Frank Skader. He has appealed from the judgment and an order denying his motion for a new trial. The contentions made in his behalf are that the information does not state facts sufficient to constitute a public offense; that the court erred in submitting instructions to the jury; and that the verdict is contrary to the evidence. We find no merit in any of these contentions, save the last.

It is alleged in the information that the offense was committed on September 22, 1913. The facts as disclosed by the testimony of the witnesses are the following: About 11 o'clock on the evening in question, Skader met one James O'Brien at a saloon referred to in the record as "Rossman's place" on upper Main street in the city of Helena. Skader then had upon his person a watch and a considerable sum of money. O'Brien invited him to have a glass of beer. The two then left the place and walked east a short distance up State street. Skader went with O'Brien for the purpose of pointing out to him the location of the red light district; O'Brien being unacquainted with the city. As they went up State street, they passed the defendant and another person going in the opposite direction. O'Brien invited Skader to accompany him on a visit to the district, but, Skader having

declined the invitation, the two turned back, and crossing State street, entered another saloon conducted by one Lissner, on the northeast corner of Main and State streets. They entered from State street by a side door at the rear of the building. The defendant and his companion had preceded them. The doorway opens upon a platform partially inclosed from which steps—four or five in number—lead down to the floor on a level with Main street, on which the building fronts. The rear portion of the room is separated from the saloon proper by a light partition and is used for a pool-room. This room was then well lighted. Several persons were present sitting about the room or engaged in playing pool. As the two were about to pass down the steps into the room, the defendant came out of a second door leading from the platform into a toilet and struck Skader on the head with his fist or a billy, and felled him to the floor, rendering him unconscious. The defendant then passed out of the side door. O'Brien helped Skader from the floor and to a chair in the saloon, and, so far as the evidence shows, then left him. After recovering, Skader returned to Rossman's place, where he spent the rest of the night, being afraid, as he said, to go to his room, to reach which he would have to go up State street. It does not appear where O'Brien and the defendant went from Lissner's place, except that defendant stated that he went up State street to his home. Both were strangers to Skader. Skader, O'Brien and the defendant were the only witnesses who testified as to what occurred at the time of the alleged offense.

Skader testified: "I saw him [Hanson] in Lissner's, which is at the upper end of Main street and State street, right at the corner. The part of Lissner's that I saw him in was the doorway; from State street is a kind of small room, and I was stepping in there, and he hit me with a club in the head." The witness then stated that a billy exhibited to him looked like the kind of a club with which he was hit. He described the room and stated that, just as he stepped inside, Hanson hit him with a club on the head, illustrating where he hit him and how the blow was delivered. He continued: "A fellow named O'Brien was with me at the time and stepped into the saloon with me. Mr.

O'Brien went in first; I was walking right behind him. I followed O'Brien into the saloon, but I didn't get a chance to go farther, except I got in the door, that is as far as I could go, because I was struck with a club. * * * O'Brien went in the side door of Lissner's first; I went in after him, right behind him. O'Brien was just going down the steps in front of me when I was hit. As to where I was hit from, from the side or in front or from behind, or from what angle—somebody came from behind out of this little room that I speak of, and I didn't shut the door shut, and turned around and I see the club. I just turned my head and I see Mr. Hanson with the club and he hit me. I don't know what happened then; I couldn't tell that. * * * As to knowing that anybody was trying to rob me and saying anything about my money, I only know just that, I got hit. Nobody said anything about my money that I know of. I couldn't state whether anybody tried to get it, whether anybody tried to get my money from my person; no, sir, I couldn't say that. * * * It looks to me like somebody was trying to rob me that night; I couldn't tell for sure that way. * * * I couldn't tell why this party that knocked me on the floor did not take my money then. As to whether I know whether this was robbery at all of my own knowledge, or an attempt to rob me, it seems to me kind a like they tried to rob me. * * * I did not lose anything at that time; there was nothing taken away from me."

O'Brien testified: "We went into the Lissner saloon. This Frank, he opened the door, and I stepped in ahead of him. When he entered the door and stepped in ahead, I started to walk in. The first thing I know I heard something. He says, 'I am hit.' At first I heard, 'Son-of-a-bitch,' he says, 'I am hit.' I turned around and the man hit him. Mr. Hanson was the man that hit him. It looked to me that he hit him with something like that thing you have got on that desk there; I don't know that it was that, but something like that. He hit him on the head. I then turned around. I said, 'Nix, none of that.' Then he quit. He didn't hit him no more. No, he didn't try to hit him again. He pushed him away from him and laughed

and walked out of the door. He opened the door with one hand and pushed the man away with the other. * * * There was no money mentioned at all, and there was no attempt to get into his pocket by anybody. Hanson passed out of the door and I went down the steps."

Clarence Miles testified that he had some six days prior to the evening in question had a couple of conversations with the defendant, and that in one of them the defendant had suggested, "Let us go out and hold somebody up and get some dough." Miles replied to this that he would see defendant around that night, but did not thereafter see him.

The defendant testified that he went into the side door of Lissner's place and stepped into the toilet. When he came out he had made up his mind to go home. He said: "I turned around and started out the door. Just as I reached for the door, O'Brien walked in, and I turned around and looked at him; I stepped into this other fellow. I didn't know who this other fellow was then. I guess he was Mr. Skader. He bumped into me and stepped on my foot, and he called me a son-of-a-bitch, and I lost my temper and hit him. I hit him with my fist. I hit him once and then just gave him a shove and walked out the door. From there I went right home, right straight up State street. There were no words passed between me and the parties I met in the door; he just said, 'Son-of-a-bitch,' and I said, 'Son-of-a-bitch, eh?' and I just hit him; that was all that was said. * * * At the time when I was going out of Lissner's saloon, and when I say I met O'Brien and Skader, I did not attempt to rob Skader by taking his money or in any way taking his property. No intention of taking his money ever entered my mind." It does not appear that either O'Brien or defendant knew that Skader had money upon his person. Skader was dressed as a common laborer, which he was, and had his watch hidden from view in a pocket under the bib of his overalls. He had not stated to anyone that he had money, nor had he exhibited any.

This evidence—which is all that reflects light upon the incident—while demonstrating that the defendant committed an unpro-

[1] voked assault upon Skader, does not justify the conclusion that his purpose was to commit the crime of robbery; for, though this crime can be accomplished only by means of force or fear (Rev. Codes, sec. 8309), and is most frequently accompanied by an assault, proof of an assault without circumstances tending to show that it was resorted to as a means to prevent resistance, and in order to obtain property from the person or immediate presence of the one assaulted, falls far short of establishing the crime of an attempt to commit robbery. An essential element of this crime is the intent. "An act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime." (Rev. Codes, sec. 8894.)

The circumstances attending the assault must disclose the [2] intent, otherwise the crime is assault only. The only fact offered by the state to supply the element of intent is the statement by the witness Miles that he had been solicited by the defendant, some six days before the assault upon Skader to join him in committing robbery. This had no reference to Skader. It was too remote to supply the basis for an inference of the specific intent necessary to be present at the time the assault was committed upon Skader. It tended to show a disposition merely and not a specific intent. And this is true though Skader was fully impressed with the conviction that defendant's purpose was to rob him. While it may be conceded that the defendant exhibited a general disposition which would lead him to commit robbery, the conclusion that he intended to rob Skader in a lighted room, in plain sight of O'Brien and apparently of the other persons present, does not seem to be in accord with the observation and experience of the ordinary man.

Furthermore, the absence of any evidence tending to show any reason why the defendant desisted from carrying out the alleged purpose lends support to the notion that the assault was delivered, as defendant said, because he was bumped by Skader as he came out of the toilet, and lost his temper. As a whole, the circumstances are, to say the least, as consistent with this conclusion as with the conclusion that there was present the specific intent to commit robbery. The intent with which an act

[3] is done may be inferred from the attendant circumstances; but, when the circumstances are such as to furnish the basis for an inference of some intent other than that necessary to constitute the particular crime charged, or the absence of any intent, a verdict of guilty of the crime charged cannot be sustained, no matter what other crime the evidence tends to establish.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

IN RE O'KEEFE.

(No. 3,437.)

(Submitted June 22, 1914. Decided June 27, 1914.)

[142 Pac. 638.]

Attorneys — Disbarment — Professional Misconduct—Estates—Culpable Negligence—Purchasing Testimony—Public Policy.

Attorneys—Estates—Culpable Negligence—Punishment.

1. Though an attorney, who in his dealings with an estate for the administrator of which he was acting ignored practically every statutory provision designed to protect estates from spoliation, was deserving of severe censure, he may not be said to have been guilty of malpractice where the evidence disclosed an absence of evil intent and that the estate was not defrauded nor the district judge deceived by reason of his culpable negligence.

[As to grounds in general for disbarment of attorneys, see note in 45 Am. St. Rep. 71.]

Same—Purchasing Testimony—Public Policy.

2. *Held*, as a matter of public policy, that an attorney is never justified in buying testimony, even though true.

Same—Purchasing Testimony—Case at Bar—Suspension.

3. An attorney, though honestly believing that unless he complied with the demand of two witnesses upon whose evidence a successful determination of his client's cause largely depended and who threatened to leave the jurisdiction in case of refusal, to guarantee them the payment of $250 out of any judgment the latter might recover (of which arrangement court and jury were made cognizant during trial, which resulted in plaintiff's favor), he would suffer defeat,

held guilty of professional misconduct, punishable, in view of mitigating circumstances, by a thirty-day suspension.

[As to burden of proof in action against attorney for negligence or willful violation of duty, see notes in 2 Ann. Cas. 603; 14 Ann. Cas. 342.]

PROCEEDINGS for the disbarment of R. E. O'Keefe, an attorney at law. Judgment of suspension for the period of thirty days.

Messrs. Purcell & Horsky submitted a brief in behalf of Respondent and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The respondent, R. E. O'Keefe, a member of the bar of this state, stands charged with malpractice in three particulars, to-wit: (1) That he filed in the district court of Blaine county an affidavit falsely accusing W. B. Sands, also a member of the bar of this state, with unprofessional conduct; (2) that, as attorney for the estate of Pauline Lane, he purposely conducted the proceedings therein in an indefinite, uncertain and incomplete manner, with the intent that the administrator thereof might defraud the same; (3) that he, while acting as attorney for the plaintiff in a certain action then pending in the district court of Blaine county, and with the intent wrongfully and corruptly to procure John Nakladahl and Annie Nakladahl to become interested in said action as witnesses for said plaintiff and by their testimony to corruptly insure a verdict for said plaintiff, did write and send certain letters promising to pay said Nakladahls out of any judgment recovered by plaintiff in said action the sum of $250 over and above their expenses, in consideration of their appearance as witnesses at the trial on behalf of plaintiff. These charges were referred for investigation to Ira T. Wight, Esq., as a special commissioner of this court, with directions to report his proceedings and recommendations in the premises. This has been done. The respondent has been heard in person and by counsel before us, and the cause now stands for final disposition upon the record presented.

At the outset we desire to express our appreciation and approval of the manner in which the commissioner has discharged

the delicate and difficult duty imposed upon him. It is quite clear to be seen that without a firm hand the proceedings would have degenerated into a mere exhibition of ill feeling with charges and counter-charges in no wise relevant to the inquiry. The commissioner, however, with eminent fairness has succeeded in placing before us all that is material to the accusation and all that can fairly make for the exoneration of respondent. His conclusions are just and merciful, and we proceed to show why, in the judgment of this court, they ought to be, and are, adopted.

1. The affidavit of respondent filed in the district court of Blaine county in the case of *Smith* v. *Kirk*, averred that W. B. Sands "falsely and fraudulently, and with the intent and purpose to mislead and deceive the Honorable Frank N. Utter, judge of this court, did procure to be made, and make, certain false oral statements to the said judge, and did exhibit and read to the said * * * judge * * * certain false affidavits and statements in writing * * * wherein and whereby the said W. B. Sands procured" from said Judge a certain order in said cause. The commissioner, in considering this charge, declined to pass upon the actual merits of the controversy between counsel in the case of *Smith* v. *Kirk*, but held that, under all the circumstances disclosed by the evidence, no sufficient ground was made to appear for the disbarment of the respondent. In this we concur, remarking, however, that while there was reason for the respondent to challenge the accuracy of Mr. Sands' representations to Judge Utter, the drastic conclusions of the affidavit were not warranted by any specific averments.

2. The details of the second charge need not be specified. [1] Suffice it to say that practically every statutory provision designed to protect estates from spoliation by giving record information of their character and condition was ignored, and ignored so effectively that the inference of sinister motive was inevitable. A consideration of the evidence, however, prompts the conclusion that no evil intent existed on the part of anyone "to loot the estate or deprive the infant heir of any of her inheritance"; that, in point of fact, she was not defrauded, but was treated by the administrator fairly and generously, and that

the district judge was not deceived. This being true, the respondent is entitled to have the second charge dismissed.

The respondent insists that the commissioner's recommendation of censure in connection with a dismissal of this charge is unjust, and counsel suggest that: "If respondent had been charged with carelessness or incompetency, perhaps he could have met that charge by showing that all errors and omissions had been called to the attention of the court and considered too trivial to need correction." No such showing would have availed, for errors and omissions such as are here disclosed cannot be considered too trivial for correction. We will not do respondent the injustice of imputing to him a degree of incompetence so gross, and, though the showing of actual fair dealing and honesty has avoided the inference of sinister motive, we cannot overlook the only alternative of culpable negligence; for we cannot, even by inference, set the seal of our approval upon such haphazard and irresponsible methods in dealing with estates.

One of the things imputed to respondent in connection with this charge is that, while the estate was pending, he was directly and financially interested in continuing the house of prostitution conducted by Pauline Lane at the time of her death, and received large sums of money for using his influence to prevent prosecution of the inmates thereof. The respondent resents this imputation more than any, and keenly feels that the commissioner's finding of no justification for it in the evidence is not ample. We hardly see how the commissioner could have done more; but for the satisfaction of the respondent we are glad to say that, not only is there no justification for this imputation in the evidence, but that it appears to have been wholly inexcusable.

3. As presenting the view of the third charge most favorable to the respondent, we state the facts substantially as asserted by his counsel. Some time prior to October 24, 1913, one John [2, 3] Flynn committed a brutal and dangerous assault upon E. E. McIntosh in the presence of John and Annie Nakladahl. McIntosh was rendered unconscious from the first blow or blows administered by Flynn, and the Nakladahls were therefore the

only witnesses who could testify impartially to the particulars. On October 24, 1913, McIntosh commenced his action for damages against Flynn, and almost immediately thereafter the Nakladahls began demanding money of McIntosh. They were transients, looking for public lands on which to locate, and some time before the trial were seen at the depot by McIntosh about to leave for parts unknown. They demanded of McIntosh, as a condition to their advising him of their whereabouts and to their appearance as witnesses in his behalf, that he guarantee them $250 out of any judgment he might recover in his action. McIntosh promised to do this, and they agreed to communicate with him upon arrival at their destination if his promise then appealed to them as satisfactory. Thereafter McIntosh received from one Parrotte the following:

"Great Falls, Mont., Nov. 14th, 1913.

"Mr. Ed. C. McIntosh,

"Chinook, Mont.

"Dear Sir: There are now living with me a family named Nakladahl, recently of your town. From the story they have told me of a fracas in which you figured prominently, I imagine you have a cinch on large damages with their assistance. Without this, I fancy, your chances are not particularly good, since they were the only witnesses to the assault, and your opponent's word in law is as good as yours. Now, unfortunately for you, they fancy that you have not acted as handsomely as circumstances should warrant. This being the case, it would seem to be to your interest to treat them fairly. Of course they can be subpoenaed and compelled to testify, but when a person is *made to speak* it is easy for one to *forget* the most important part. Now, it is possible that you place some value upon your life, and as the lady certainly saved it by her intercession I have assured them that you will prove appreciative and reward them abundantly. They, however, insist upon a *legal* guaranty. Should you deem it worth while to write me upon the subject, I will gladly use my influence in your behalf.

"Obediently yours,

"JAMES E. F. PARROTTE."

This letter was taken by McIntosh to the respondent, who answered it as follows:

"Mr. James E. F. Parrotte,

"Great Falls, Mont.

"Dear Sir: Mr. E. E. McIntosh has handed me for answer your letter of the 14th instant relative to John Nakladahl and wife, as I am attorney for Mr. McIntosh in the prosecution of the damage suit against Flynn. Mr. McIntosh is willing to pay these people $250 in cash if he gets a favorable judgment against Flynn, and is willing to pay them their regular witness fees in any event, and will make them a guaranty of any kind that Mr. Nakladahl may be satisfied with. You understand that Mr. McIntosh is a poor man and that it would be impossible for him to advance this money now. I wish you would endeavor to get these people to believe that Mr. McIntosh will do the right thing with them in case he gets a judgment against Flynn. Flynn is well fixed, and there will be no question of collecting the money from him in case we get judgment. If this letter is not a sufficient guaranty please have Mr. Nakladahl suggest what he desires further in that respect, and very much oblige,

"Yours very truly,

"R. E. O'KEEFE."

Parrotte replied, insisting upon a guaranty drawn up in legal form, securing the Nakladahls the sum of $250 over and above expenses, even though McIntosh be awarded but enough to pay them and counsel, and that the respondent secure them against any seizure of the award by any possible creditor. Mr. O'Keefe's response was this:

"Dec. 3, 1913.

"To John Nakladahl and Annie Nakladahl,

"Great Falls, Montana:

"As attorney for Mr. E. E. McIntosh, and in furtherance of negotiations and agreement heretobefore had with you, I make you the following guaranty: You having indicated a desire not to appear in our court to testify in the case of McIntosh against Flynn without being reimbursed in the sum of $250 therefor, and Mr. McIntosh having agreed under the circumstances to pay

you $250 over and above your expenses out of any judgment which he may recover in said action against said Flynn. Now, in consideration of the premises and of your refusal to testify in said action without being so recompensed and guaranteed, as attorney for Mr. McIntosh I hereby guarantee to you that I will pay you for him, out of any moneys that may come into my hands as his attorney in settlement of any judgment which he may recover against said Flynn, the full sum of $250, which sum I hereby guarantee to withhold out of any moneys which said McIntosh may receive in settlement of any judgment recovered against said Flynn and to pay to you or your order, if, and in consideration of, your appearing as witnesses on behalf of the plaintiff McIntosh in the suit above mentioned at the time of the trial of said action. Respectfully,

"R. E. O'KEEFE,
"Attorney for E. E. McIntosh."

These letters from respondent to Parrotte form the basis of the third charge, and respondent does not deny their authorship. He presents, by way of justification, however, one legal and various fact considerations to which we shall advert.

His fact considerations are that the Nakladahls had threatened, if compelled to testify, to forget what had happened, and he had reason to believe, and did believe, their attitude in this respect had been prompted by the agents of Flynn; that he never intended to pay them anything, and so worded his letter as to advise anyone of the involuntary character of the promise contained therein; that he had no intention or purpose to procure the Nakladahls to testify falsely or to in any wise color their testimony, but was actuated solely with the desire to protect the rights of his client by insuring their testimony to the truth necessary for the establishment of his cause; that he felt this to be a right and proper discharge of his duty to his client; that the Nakladahls did not speak English well, and in the giving of testimony, their illustrations by physical gesture would be of more importance than their statements, hence their depositions would be of comparative little value; that upon the trial of the cause of *McIntosh* v. *Flynn* all these letters were produced in

court, read to the jury, and the circumstances connected with the writing of the same were fully disclosed to the judge presiding and to the jury sitting in the cause; that prior to the trial respondent, supposing Judge Utter would preside at the trial, made a similar disclosure to Judge Utter; that upon the trial respondent announced, in the presence of the Nakladahls, his intention not to pay them any part of the money promised; that at the very time Parrotte was communicating with respondent, Parrotte was also communicating with Flynn, and, as a result, counsel for Flynn went to Great Falls, called upon the Nakladahls, and purloined from them the letter which had been written by respondent to them; that McIntosh was clearly entitled to a verdict from Flynn in said cause, as is evidenced by the fact that Flynn pleaded guilty to a criminal charge of which the assault involved in said civil action was the basis, and as evidenced by the further fact that after the jury had heard all the testimony touching the circumstances of the assault, as well as the circumstances connected with the writing of the letters, they returned a verdict for McIntosh and against Flynn in the sum of $2,000, upon which verdict judgment was entered, and which judgment was paid by Flynn with little, if any delay, and with no attempt to appeal or seek a review thereof; that the testimony given upon the trial of said cause by the Nakladahls was the truth, and nothing but the truth, and that it never was the intent or purpose of the respondent that any other testimony than the truth should be given by them; and, finally, that the reputation of respondent as a person of good moral character is established by the testimony of leading citizens in that community.

The legal consideration presented by the respondent is that, in view of the facts above recited, he is entitled to be entirely acquitted and discharged of the accusation, for the reason that the writing of these letters for the purpose of securing truthful testimony is not an act of malpractice nor any infraction of legal ethics. In support of this contention we are cited to Marvelle on Legal Ethics, pages 116–119, and to the California case of *In re Barnes*, 2 Cal. Unrep. 847, 16 Pac. 896. In the latter

authority we find the following remarkable language: "Lawyers meet and are compelled to contend with all sorts of people. They have in their hands the interests of their client, and they should not permit him to lose the benefit of important testimony upon any refined ideas of propriety. Frequently witnesses whose testimony is essential know the value of their position, and too often attempt to realize upon it. It is a trying thing for an attorney to be placed in a situation where he must deal with such a witness; and, while an honorable attorney would be careful to make no payments or promises which could affect the truthfulness of the evidence, all would try to retain the witness, however much he would be compelled to despise him." We are not impressed with this reasoning; its application to the present case proceeds upon the mistaken notion that the attorney's duty to his client is superior to every consideration of public policy, and its inadequacy is revealed by the fact that the court held the conduct of Barnes to be open to criticism, though justified by the circumstances. A sufficient answer, we think, is stated by the commissioner in his report upon this aspect of the case: "An attorney's duty to his client is a solemn obligation, but it has never been held to be greater than the law itself. However just an attorney may believe his client's claim to be, he may not liquidate it by force of arms, by bribery or any other unlawful means. * * * An expert may be paid large sums for his testimony without it being considered bribery, but the theory of the law as to expert witnesses and witnesses testifying to matters of unscientific fact is not the same. The payment of large sums to an expert is considered in the nature of an employment for rendition of services. If large sums may be paid or promised to an ordinary witness, and that in itself not be condemned, then in every case where it appears that money was so paid or promised the court will be confronted with the difficult, if not impossible, task of probing into the brain of the promisor to determine whether such promise was to induce the witness to testify to the truth or to a falsehood. It is contrary to the presumptions of law that a witness must be hired to speak the truth, and, although there may be cases where a witness

refuses to testify to the truth without an inducement, if the rule be established that such inducement be permissible, the floodgates of fraud and bribery will be thrown wide."

The letters in question were not merely a promise to pay, but they made the payment contingent upon the successful outcome of the case. The fact that no legal liability was created by them, though they were drafted so as to deceive the Nakladahls into the belief that a valid promise had been made, does not meet the case. The material question is what effect such promises are calculated to produce upon a witness or upon his testimony, and it cannot be gainsaid that this effect is not in the direction of plain, unvarnished truth. In such matters the exigencies of any given cause must yield to the larger demands of public good, and we decline to hold that it is proper in this state for an attorney to buy testimony, whether true or false.

But the existence of reputable authority for the course pursued by the respondent, the exigencies of his cause, his apparent honesty of purpose, his belief that his witnesses were being stolen from him—all concur, in our judgment, to largely mitigate his conduct, and we feel that an order of disbarment would not be justified. We must, however, emphasize the views we have expressed with regard to the third charge, and this can only be done by the imposition of some punishment.

It is therefore ordered that Mr. R. E. O'Keefe, a member of the bar of this state, be suspended as attorney and counselor for the period of thirty days, at the expiration of which time he may resume the practice of law without further order.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

SUTHERLAND, RESPONDENT, v. GREEN ET AL., APPELLANTS.

(No. 3,311.)

(Submitted April 30, 1914. Decided July 11, 1914.)

[142 Pac. 636.]

Sales—Animals—Stallions — Bills of Sale — Parol Evidence—Remedies—Breach of Warranty—Documentary Evidence—Resale—Cause of Action—Waiver.

Evidence—Contracts in Writing—Parol Evidence—Admissibility.

1. A conversation between buyer and seller had prior to the execution of a bill of sale with the terms of which it was not in conflict, and which was material to show the circumstances under which the writing was executed, *held* admissible in evidence and not open to the objection that it varied the written agreement.

[As to parol evidence to modify or explain bill of sale, see note in 19 Ann. Cas. 541.]

Sales—Animals—Breach of Warranty—Remedies.

2. The purchaser of a stallion under a bill of sale warranting that the animal could be returned and exchanged for another in case the first failed to meet the warranty, was not restricted to the remedy provided in the bill but could, upon refusal of the seller to take back the animal, or failure to offer a substitute acceptable to the buyer, maintain his action to recover the purchase price.

Same—Written Contracts—Parol Agreement—Evidence—Admissibility.

3. The mere execution of a writing (bill of sale) by one party to a contract (seller) does not exclude proof of a parol agreement (sale of an animal) offered by the buyer, the terms of which had been agreed upon and the purchase price paid before execution of the bill.

Same—Resale—Breach of Warranty—Waiver of Cause of Action.

4. In the absence of an express waiver, the resale of the animal referred to above did not waive the cause of action which arose in favor of the first buyer out of a breach of the warranty under which it was bought.

Same—Documentary Evidence—Admissibility.

5. A tally sheet required to be kept by the buyer of the stallion and returned to the seller in the event of dissatisfaction on the part of the former, *held* admissible in an action to recover the purchase price, it having been a record made in the regular course of business for the benefit of defendant.

Appeal from District Court, Custer County; Sydney Sanner, Judge.

ACTION by Donald Sutherland against C. W. Green and another, partners as Green & Ingham. Judgment for plaintiff and defendants appeal from it and an order denying their motion for a new trial. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Loud, Collins, Brown, Campbell & Wood, for Appellants.

The evidence introduced over our objections was incompetent, and anything that was said by either Mr. Sutherland or Mr. Green prior to or at the time of the signing of the bill of sale or agreement is incompetent. We understand the rule to be that: "Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." (1 Greenleaf on Evidence, sec. 275.) "It is a well-settled rule of law that, where a written contract is made, oral warranties and implied warranties, and all oral negotiations are merged in the written contract and by its terms the parties must be bound." (*McCormick Harvesting Mach. Co.* v. *Yoeman,* 26 Ind. App. 415, 59 N. E. 1069; *J. I. Case Threshing Mach. Co.* v. *Hall,* 32 Tex. Civ. App. 214, 73 S. W. 835.)

The theory of the court was that this was an action for the recovery of damages for a breach of warranty. Assuming that such is the case, we say that there is no warranty in the bill of sale in question upon which this action can be predicated. The bill of sale by its terms contains all of the agreements of warranty or guaranty made by the appellants in the sale of the stallion, so that the respondent cannot base his action upon any oral or implied warranty. The motion for nonsuit should have been granted, and we are supported in our contention by the following authorities: *Davis* v. *Iverson,* 5 S. D. 295, 58 N. W. 796; *Walters* v. *Akers,* 31 Ky. Law Rep. 259, 101 S. W. 1179; *Dunham* v. *Salmon,* 130 Wis. 164, 109 N. W. 959; *Wisdom* v. *Nichols-Shepherd Co.,* 29 Ky. Law Rep. 1128, 97 S. W. 18; *J. I. Case Threshing Mach. Co.* v. *Hall, supra; Mesnard* v. *Aldridge,* 3 Esp. (Eng.) 271.

Executory contracts may be rescinded by the parties to them only where they continue interested until the attempt to rescind is made. (9 Cyc. 595; *Johnson* v. *Reed,* 9 Mass. 78, 6 Am. Dec. 36.) Assuming, for the sake of the argument, that the bill of sale itself contained a warranty as to the breeding quality of

the stallion in question, then we desire to call the court's attention to another familiar principle of law which is that the warranty is addressed to some particular person and the buyer alone can avail himself thereof, and his assigns or subsequent purchasers cannot avail themselves thereof as against the original seller. (35 Cyc. 370; *Nelson* v. *Armour Packing Co.*, 76 Ark. 352, 6 Ann. Cas. 237, 90 S. W. 288; *Smith* v. *Williams*, 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394; *Prater* v. *Campbell*, 110 Ky. 23, 22 Ky. Law Rep. 1510; 60 S. W. 918; *Post* v. *Burnham*, 83 Fed. 79, 27 C. C. A. 455.) The rule of law that executory contracts may be rescinded by the parties to them only where they continue interested is by analogy equally applicable to contracts of warranty, particularly in the light of the rule herein last announced, to the effect that a warranty addressed to a particular person can only be availed of by that person.

Messrs. Geo. W. Farr, H. E. Herrick and *Frank Hunter*, for Respondent.

HONORABLE GEORGE W. PIERSON, a Judge of the Thirteenth Judicial District, sitting in place of MR. JUSTICE SANNER, disqualified, delivered the opinion of the court.

These appeals are by defendants from a judgment and an order denying their motion for a new trial.

Plaintiff purchased a stallion of defendants at an agreed price of $900. At the time of purchase defendants were copartners, the partnership being dissolved some two days later by mutual agreement. Defendant Green had conducted the negotiations with plaintiff, and under the terms of dissolution was to perform all resulting obligations of the firm. The action was for the recovery of the purchase price.

Plaintiff testified: "I looked this horse over, and wanted to know all about him, if he was a good horse, and he said he had used him in Miles City here the summer previous and if I would come up here he would show me his colts. I talked with Green and told him I wanted the horse for raising colts, for breeding purposes. I told him I had range mares and wanted a stallion

that I could throw in the corral with the mares, and he said this horse was suitable for that purpose; that he had used him in Miles City. There was something said about his being a foal-getter. I purchased the stallion of him that day. * * * Mr. Green gave me the contract or bill of sale that has been introduced in evidence here marked 'Defendants' Exhibit 1,' after I paid him for the horse."

Witness Dan Sutherland testified in behalf of the plaintiff: "I overheard conversation between Mr. Green and Mr. Sutherland in reference to that horse. Green represented this horse to be a horse that he had stood for one year in Miles City here, the year previous to that, and that his guaranty called for fifty per cent in colts." These conversations were had prior to the execution of the bill of sale signed by C. W. Green, agent, which contains the following provisions: "In the event that the above-named stallion in perfect health, with proper usage, and the mares to him regularly returned, tried and bred on one full service season's trial, does not get with foal fifty per cent of the mares regularly tried and bred to him, then on return of the said stallion to us at Miles City, Montana, during the first week in the month of April next, following the full service season first concluded after the date hereof, in good health and condition, we agree to furnish the above-named purchaser, without further charge, another pure-bred stallion of equal quality, in exchange."

The instrument provides further for the accurate keeping of a tally sheet, and its return by registered letter not later than July 15, 1910, in the event the conditions are not faithfully performed: "Time being the essence of this contract; or should the above-named stallion hereafter become injured or disabled through accident or disease, this warranty shall be null and void and of no effect, and all obligations incurred by us herein shall be considered fulfilled and ended." "This bill of sale contains all the agreements of warranty or guaranty made by us in the sale of the above-mentioned stallion, and it is expressly provided that we shall not be liable for any claim that may hereafter be made, alleging any verbal agreement of ourselves or agent in the sale of said horse."

Plaintiff, after breeding the horse to one mare, being dissatisfied with the service, sold him upon the same terms made with defendants, to one Sutton, taking his note for the purchase price of $900, providing the horse should be returned and the note delivered if he failed to get fifty per cent of mares bred, with colt. The tally sheet was kept by Sutton, or under his direction, and mailed to defendants. The stallion proved barren without a single exception. Plaintiff complained of this fact to defendants and offered to return the animal when in good health. It is alleged in the complaint that defendants prevented the return. Some seven days subsequent to the commencement of this action, the stallion died in the possession of plaintiff after return to him by Sutton and the surrender of Sutton's note.

The trial court limited the amount of recovery to the sum of $1,040, this amount being the purchase price with interest at the legal rate from the date of purchase to the day of trial. The other items of damages alleged in the complaint were excluded.

Appellants objected to the admission of the conversation had [1] between plaintiff and defendants prior to the execution of the bill of sale, for the reason that it varied the terms of a written warranty, and now urge the overruling of their objections as error.

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." (Rev. Codes, sec. 5018.)

"A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent." (Sec. 5019.)

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." (Sec. 5037.)

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms

of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings. (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 7877, or to explain an intrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills as well as contracts between parties." (Sec. 7873.)

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." (Sec. 7877.)

The evidence admitted is not in conflict with the terms of the bill of sale and was material to show the circumstances under which it was made.

In this connection, appellant urges the bill of sale does not [2] contain a warranty that the stallion will get fifty per cent colts and that the warranty is addressed to no one. On failure to get fifty per cent of mares bred, with foal, on return of the horse and submission of proof, defendants agreed to substitute a pure-bred horse of equal quality. The obligation to give value for the purchase price is certain. The method of substitution is uncertain. Under the bill of sale, defendants could not substitute a horse as barren as the first. They were not authorized to question the accuracy of the record.

The minds of the parties had met as to the selection of the first animal. They must meet in the selection of the second, not only upon the fact that a selection is due, but upon the animal to be selected. This condition has not happened because of the fault of defendants in failing to accept the return of the first or offering a substitute acceptable to plaintiff, or offering one which in law he ought to accept. The remedy provided in the bill of sale is not exclusive. (*Nave* v. *Powell,* 52 Ind. App. 496, 96 N. E. 395; *Elwood* v. *McDill,* 105 Iowa, 437, 75 N. W. 340;

Love & Co. v. *Ross*, 89 Iowa, 400, 56 N. W. 528; *Fitzpatrick* v. *Osborne & Co.*, 50 Minn. 261, 52 N. W. 861.)

The writer is of the opinion that the evidence of the oral contract is admissible upon another ground. The rule of evidence quoted in the statute is: "When the terms of an agreement have been reduced to writing by the parties. * * * The term agreement includes deeds and wills, as well as contracts between parties." (Sec. 7873, *supra.*) The bill of sale is only signed by the defendant Green. The plaintiff did not join in the writing; neither did he perform any act relying upon it. It was not a moving cause. The only unilateral contracts mentioned in the statute are deeds and wills. The property sold in this instance had been selected; the terms of sale had been agreed upon and the purchase price paid before the defendants executed the writing, which they now say embraces all the terms of sale. It is evident plaintiff did not rely upon this instrument; neither was he induced to make the purchase by reason of it. The mere [3] execution of a writing by one party to the contract does not exclude proof of the parol agreement. (*Carpenter* v. *Hathaway*, 87 Cal. 434, 25 Pac. 549; *Kreuzberger* v. *Wingfield*, 96 Cal. 251, 31 Pac. 109; *Dunham* v. *Salmon*, 130 Wis. 164, 109 N. W. 959.)

Appellants urge that, by reason of the dissolution of the partnership existing between defendants and the subsequent sale of the stallion by plaintiff to Sutton, defendant Ingham is relieved from all liability. Quoting from their brief: "We submit that the retiring partner remains liable for all of the existing debts of the firm to the same extent as if he had not retired." They further urge that, if any warranty could be enforced at all, it [4] must be by the plaintiff and not his vendee. Assuming these two propositions state the law, it is only necessary to inquire whether Sutherland waived his right of action.

The evidence established that the stallion was valueless for any purpose. Plaintiff in making the sale to Sutton received no benefit from the purchase price. The sale was made on like terms obtained from the defendants, providing for the return of

the stallion and delivery of the note received conditionally. The evidence cannot support the conclusion that plaintiff accepted the benefit of the bargain or waived his cause of action against the defendants. The sale of the thing purchased does not waive a cause of action arising out of a breach of warranty. (Mechem on Sales, sec. 1837; *Western Twine Co.* v. *Wright*, 11 S. D. 521, 44 L. R. A. 438, 78 N. W. 942; *Eagle Iron Works* v. *Des Moines S. Ry. Co.*, 101 Iowa, 289, 70 N. W. 193; *Brigg* v. *Hilton*, 99 N. Y. 517, 52 Am. Rep. 63, 3 N. E. 51.)

The tally sheet was material for the purpose of showing the information conveyed by plaintiff to the defendants; being a [5] record made in the regular course of business, and one contemplated by the parties, it was certainly competent. This record was to be made for the benefit of defendants. In passing upon it they were not to apply rules of evidence. On the showing made, the tally sheet was proper evidence. If it was misleading or furnished for the purpose of deceit, that was a matter of defense. The stallion did not get a single foal. The question of percentage was not involved.

The foregoing disposes of the rulings upon the demurrer to the complaint and motions for nonsuit and directed verdict.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. CHIEF JUSTICE HOLLOWAY concur.

STATE EX REL. HAY, RELATOR, *v.* ALDERSON, SECRETARY OF STATE, RESPONDENT.

(No. 3,517.)

(Submitted July 9, 1914. Decided July 16, 1914.)

[142 Pac. 210.]

Initiative and Referendum—Constitutional Law—Amendments Plurality of Subjects — Publication — Sunday — Mandatory Provisions—Construction.

Constitution—Amendments—Validity—Rule of Construction.

1. The rule that a statute will not be declared unconstitutional unless its nullity is placed beyond reasonable doubt is especially applicable in the case of an amendment to the Constitution which has been decisively adopted and the invalidity of which is charged to the manner of its submission.

[As to the caution courts observe in respect of declaring statutes void, see note in 48 Am. Dec. 269. As to power of courts to determine validity of action by legislature proposing constitutional amendment, see note in Ann. Cas. 1914B, 925.]

Same—Unity of Subject—How Determined.

2. That an amendment to the state Constitution may be separated into two or more propositions is not alone decisive of its unconstitutionality under the clause requiring unity of subject in the submission of an amendment (Art. XIX, sec. 9); the rule being that if, in the light of common sense, the propositions have to do with different subjects so essentially unrelated that their association is artificial, they are not one, but if they may be logically viewed as parts or aspects of a single plan, the constitutional requirement above is met in their submission as one amendment.

Same—Initiative and Referendum—Validity of Amendment.

3. *Held,* under the rule above, that the amendment to section 1, Article V of the state Constitution, providing for direct legislation and reference of laws, is not invalid as violative of the provision of section 9, Article XIX, providing that should more than one amendment be submitted at the same election, it shall be done in such a manner that each can be voted upon separately.

Same—Publication—When Sufficient.

4. *Held,* that the provision of section 9, Article XIX, requiring publication of a proposed constitutional amendment in full in at least one newspaper in each county for three months previous to the next general election, was satisfied by publication in a weekly, or once a week in a daily or semi-weekly paper, in the absence of a provision indicating the number of issues in which the proposed amendment must appear, or designating the character of the paper as monthly, weekly or daily.

Same—Publication on Sunday.

5. In the absence of a prohibitory statute, any ministerial act, such as the publication of an amendment to the state Constitution, may be done on Sunday as efficaciously as if done on any other day.

Same—Rule of Construction.

6. In the construction of a constitutional provision, any rule which either offends against every dictate of common sense or defeats the very object of the provision to which it is applied, ought not to be adopted.

Same—Amendments—Publication—Substantial Compliance Sufficient.

7. *Held* that the provision of section 9, Article XIX of the Constitution, respecting publication of a proposed amendment thereto, has to do with one of the features of the amending process which is referable to the rule of substantial, rather than literal, compliance, even though under section 29, Article III, the provisions of that instrument are declared to be mandatory and prohibitory,—especially in the absence of any intimation that injury resulted from a failure to comply literally with the requirement.

Same—Initiative and Referendum—Publication—Sufficiency.

8. Under the rule that every reasonable intendment will be indulged in favor of the validity of a constitutional amendment after its ratification by the people at the polls, the Initiative and Referendum amendment to section 1, Article V, of the Constitution, adopted by a vote of 5.5 to 1 about eight years before its validity was questioned on the ground, *inter alia*, that the secretary of state had failed to literally comply with the constitutional requirement touching publication thereof, *held* properly submitted.

Original application by the state, on relation of G. R. Hay, for an injunction restraining A. M. Alderson, as secretary of state, from proceeding to refer a certain law to the people for adoption or rejection. Order to show cause discharged, and proceeding dismissed.

STATEMENT OF THE CASE.

The thirteenth legislative assembly enacted a measure known as House Bill No. 154, under the title: "An Act establishing a state athletic commission and regulating boxing and sparring in the state of Montana." (Laws 1913, p. 429.) By approval of the Governor it became a law on March 14, 1913. Within six months after the adjournment of the legislature a referendum petition was filed with the secretary of state, signed by the requisite number of electors, designated as "Referendum Measure No. 6," ordering that the Act be referred to the electors of the state for their approval or disapproval at the election to be held on November 3, 1914, under the provisions of section 1 of Article V of the Constitution. In pursuance of the statute enacted to effectuate this provision, and within the time prescribed (Rev. Codes, sec. 110; Laws 1913, Chap. 66, sec. 1), the

secretary of state was proceeding to furnish the clerks of the several counties of the state with copies of the referendum measure, with the title thereto, for distribution among the electors therein, when the relator, a qualified elector and resident taxpayer of Lewis and Clark county, applied to this court for an injunction to restrain the respondent, as such officer, from proceeding further in the premises. In making the application, the relator proceeded upon the assumption that the secretary of state, in having the copies printed and furnished to the clerks at the expense of the state, was acting without authority of law, in that the amendment to section 1 of Article V of the Constitution, *supra,* providing for direct legislation and reference of laws, was never legally submitted to, and ratified by, the electors of the state and is therefore invalid, and that the legislation enacted to effectuate it is also invalid. Upon the filing of the petition an order to show cause was issued. The respondent appeared by general demurrer. This having been overruled *pro forma,* he filed an answer. Though the answer contains formal denials of some of the allegations of the petition, it presents no material issue of fact. Therefore the questions for decision arise upon the facts as alleged in the petition, which may be briefly stated as follows:

The ninth legislative assembly passed an Act requiring the submission of the amendment in question to the electors of the state. The Act set out in full the section as it would read as amended. It provided the form of the ballot to be used, directing that there should be printed thereon the following: "For the Amendment to the Constitution Providing for Direct Legislation and Reference of Laws," and "Against the Amendment to the Constitution Providing for Direct Legislation and Reference of Laws."

When the Constitution was adopted, the section read as follows: "The legislative power shall be vested in a Senate and House of Representatives, which shall be designated 'The Legislative Assembly of the State of Montana.'" (Article V, sec. 1.)

The amended section is the following: "The legislative authority of the state shall be vested in a legislative assembly, consist-

ing of a Senate and House of Representatives; but the people reserve to themselves power to propose laws, and to enact or reject the same at the polls except as to laws relating to appropriations of money, and except as to laws for the submission of constitutional amendments, and except as to local or special laws, as enumerated in Article V, section 26, of this Constitution, independent of the legislative assembly; and also reserve power at their own option to approve or reject at the polls, any Act of the legislative assembly, except as to laws necessary for the immediate preservation of the public peace, health or safety, and except as to laws relating to appropriations of money, and except as to laws for the submission of constitutional amendments, and except as to local or special laws, as enumerated in Article V, section 26, of this Constitution. The first power reserved by the people is the initiative, and eight per cent of the legal voters of the state shall be required to propose any measure by petition; provided, that two-fifths of the whole number of the counties of the state must each furnish as signers of said petition eight per cent of the legal voters in such county, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state, not less than four months before the election at which they are to be voted upon.

"The second power is the referendum, and it may be ordered either by petition signed by five per cent of the legal voters of the state; provided, that two-fifths of the whole number of the counties of the state must each furnish as signers of said petition five per cent of the legal voters in such county, or, by the legislative assembly as other bills are enacted.

"Referendum petitions shall be filed with the secretary of state, not later than six months after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people by the legislative assembly or by initiative referendum petitions.

"All elections on measures referred to the people of the state shall be had at the biennial regular general election, except when

the legislative assembly, by a majority vote, shall order a special election. Any measure referred to the people shall still be in full force and effect unless such petition be signed by fifteen per cent of the legal voters of a majority of the whole number of the counties of the state, in which case the law shall be inoperative until such time as it shall be passed upon at an election, and the result has been determined and declared as provided by law. The whole number of votes cast for Governor at the regular election last preceding the filing of any petition for the initiative or referendum shall be the basis on which the number of legal petitions and orders for the initiative and for the referendum shall be filed with the secretary of state; and in submitting the same to the people, he, and all other officers, shall be guided by the general laws and the Act submitting this amendment, until legislation shall be especially provided therefor. The enacting clause of every law originated by the initiative shall be as follows: 'Be it enacted by the people of Montana.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure."

At the election held on November 6, 1906, the amendment was ratified by the following vote: For the amendment, 36,374; against the amendment, 6,616—the affirmative and negative vote cast in the several counties being approximately in the same ratio. On December 6, 1906, by proclamation the Governor declared the amendment to be in force. Prior to the election, publication was directed by the secretary of state to be made in newspapers in the several counties to meet the requirement of section 9, Article XIX, of the Constitution. In most of the counties publication covered the full period of three months immediately prior to the day of the election. In about one-third of the entire number publication was made for thirteen consecutive weeks only from and after July 27, 1906, the earliest date of any publication, thus leaving ten days or more—in one instance twenty-three—to intervene between the date of the last publication and the day of election. In three counties publication was made in one issue each week in a daily paper. In one

instance publication was made in the Sunday issue only of a daily paper, except that during the last week before the election publication was made daily. In another publication was made only in the alternate issues of a semi-weekly paper.

Mr. Odell W. McConnell, for Relator, submitted a brief, and, jointly with *Mr. Henry C. Smith,* of Counsel, argued the cause orally.

This court has specifically held that the provisions of Article XIX, section 9, of the state Constitution, relative to amendments to the Constitution, are mandatory, and a noncompliance with the requirements of this section renders the adoption of a proposed amendment nugatory. (*State* v. *Tooker,* 15 Mont. 8, 25 L. R. A. 560, 37 Pac. 840; *Durfee* v. *Harper,* 22 Mont. 354, 56 Pac. 582.)

More than one amendment to Article V of the Constitution was submitted without so preparing and distinguishing the same by numbers or otherwise that each could be voted upon separately. Article XIX above expressly provides that if more than one amendment is submitted at the same election they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately. This provision of the Constitution is mandatory. An examination of section 1 of Article V of the Constitution, as amended, discloses that two separate and distinct powers are reserved by the people. The amendment voted upon and passed in 1906 labels them "The first Power" and "The Second Power." The first power is called the "initiative" and the second power is called the "referendum." The plan of putting in force the initiative is different from the plan to make the referendum effective. A different number of votes is required to order the initiative (eight per cent) than that to order the referendum (five per cent). One is the distinct power of enacting or making laws; the other is a different power, being that of vetoing laws. The initiative is legislative in character. The referendum power is executive in character, being a veto power the same as the Governor exercises. The initiative performs a positive function, while the ref-

erendum accomplishes a negative function. One is the antithesis of the other. One originates and starts something; the other kills and stops. One power is not dependent upon the other. One power may be invoked, the other not. Each power is complete within itself. The referendum amendment might have been passed and no mention at all made of the initiative, and *vice versa*. The referendum is of ancient origin. It made its appearance in Switzerland in 1831 under the name of "Veto." The initiative is a more recent measure. Treatises on the initiative and referendum consider the two measures as separate and distinct subjects. Oberhaltzer on the Referendum, Initiative and Recall in America devotes 300 pages in his work to the Referendum, before taking up or discussing the Initiative as a separate and distinct policy. Phelps on Initiative and Referendum considers them as two independent powers. The ballot for the amendment requires the voter to vote for "Direct Legislation and Reference of Laws." He cannot vote for "Direct Legislation" and against "Reference of Laws," nor can he vote for "Reference of Laws" and against "Direct Legislation." He must vote for both or against both. He cannot segregate nor vote for one without voting for the other. The form of ballot denied him the right to vote for one and against the other.

The true test as to whether "Direct Legislation" and "Reference of Laws" constitute one amendment or two amendments may be determined by inquiring as to whether one of them could be adopted without the other, or whether one of them could be adopted without being controlled, modified or qualified by the other. (See *McBee* v. *Brady*, 15 Idaho, 761, 100 Pac. 97; *State ex rel. McClurg* v. *Powell*, 77 Miss. 543, 48 L. R. A. 652, 27 South. 927.) The case of *State* v. *Timme*, 54 Wis. 318, 11 N. W. 785, holds: "In order to constitute more than one amendment, the propositions submitted must relate to more than one subject and have at least two distinct and separate purposes, not dependent upon or connected with each other."

It matters not that the amendments in this case were addressed to section 1 of Article V. This does not make it one amendment, as was held in the *McBee-Brady Case, supra.* (See, also, *Lobaugh* v. *Cook,* 127 Iowa, 181, 102 N. W. 1121; *Lozier* v. *Alexander Drug Co.,* 23 Okl. 1, 99 Pac. 808; *Armstrong* v. *Berkey,* 23 Okl. 176, 99 Pac. 921.)

The application of the above test conclusively shows that two amendments were proposed as one amendment without being so prepared, numbered or designated that they could be voted upon separately, in direct violation and derogation of the mandatory provision of the Constitution requiring them so to be.

Were the amendments published in at least one newspaper in each county of the state for three months previous to the election? An attempt was made to publish notice of the proposed amendments in each county of the state, and contracts were sent to some paper in each county, but instead of the contract specifying, in the language of the Constitution, that the publication should be made "for three months" in each and every issue of the paper so contracted with, the contract required the publication to be made once a week only, and for thirteen weeks. The provision of Article XIX, section 9 of the Constitution, which requires the amendments to be published for three months previous to the election, is mandatory. It was so expressly held by this court in the case of *State ex rel. Woods* v. *Tooker,* 15 Mont. 8, 25 L. R. A. 560, 37 Pac. 840. Three months means a period of ninety days, and when the Constitution said the publication must be made "for three months," it meant three full months or ninety days,—not six days short, not one day short, but all of ninety days. The word "month" means a calendar month of thirty days, and three months mean ninety days. (Rev. Codes, sec. 16; *Sprague* v. *Norway,* 31 Cal. 173; *Savings & Loan Soc.* v. *Thompson,* 32 Cal. 347; *Guaranty Trust etc. Co.* v. *Greene Cove Springs etc. R. Co.,* 139 U. S. 137, 35 L. Ed. 116, 11 Sup. Ct. Rep. 512.) Where the requirement was that the publication shall be "for four weeks," the court held that this requires twenty-eight days' publication. So

where the Constitution requires the publication to be "for three months," this requires ninety days' publication. (*Young* v. *Downey*, 150 Mo. 317, 51 S. W. 751; see, also, *State* v. *Tucker*, 32 Mo. App. 620, 630; *Loughridge* v. *City of Huntington*, 56 Ind. 253, 260; *Maxwell* v. *Burns* (Tenn. Ch.), 59 S. W. 1067; *Lawson* v. *Gibson*, 18 Neb. 137, 24 N. W. 447; *Whitaker* v. *Beach*, 12 Kan. 492; *Hellman* v. *Merz*, 112 Cal. 661, 44 Pac. 1079; 12 Ency. of Pl. & Pr. 35.) The language of the Constitution is "for three months." The preposition "for" is the equivalent of the word "during." (*Lawson* v. *Gibson*, 18 Neb. 137, 24 N. W. 447; *Whitaker* v. *Beach*, 12 Kan. 492.)

There is a distinction between those cases where the publication was to be "for" a definite space of time and those cases which require a "weekly" publication for a certain number of weeks. The first requires a publication "for," "throughout" or "during the continuance of" six weeks, and nothing short of publication for forty-two days will satisfy this Act. The other requires at least six publications, and that one of them shall be in each of the six weeks between the first publication and the day of sale. (*Finlayson* v. *Peterson*, 5 N. D. 587, 57 Am. St. Rep. 584, 33 L. R. A. 532, 67 N. W. 953; 13 Ency. of Law, 738; *Leavitt* v. *Bell*, 55 Neb. 57, 75 N. W. 524; *Early* v. *Doe*, 57 U. S. (16 How.) 610, 14 L. Ed. 1079; *Bacon* v. *Kennedy*, 56 Mich. 329, 22 N. W. 824; *Muncey* v. *Joest*, 74 Ind. 409; *Wilson* v. *Northwestern Mut. Life Ins. Co.*, 65 Fed. 38, 12 C. C. A. 505; *Harmon* v. *Whittemore*, 7 Ohio Dec. 92; *Mitchell* v. *Woodson*, 37 Miss. 567; *Dever* v. *Cornwell*, 10 N. D. 123, 86 N. W. 227.)

Publication was not made in every issue of the paper; in daily papers it was made weekly, and in semi-weekly papers it was made in every other issue of the paper only. There were no daily publications of notice of the proposed amendments in any papers. In no paper in the state were they published oftener than once a week. When the publication was made in a daily paper it should have been continued in each and every issue of that paper, and likewise in a semi-weekly paper, publication

should have been made in each and every issue thereof. (*Union Pacific Ry. Co.* v. *Montgomery*, 49 Neb. 429, 68 N. W. 619; *Hull* v. *Chicago B. etc. R. Co.*, 21 Neb. 371, 32 N. W. 162; *Whitaker* v. *Beach*, 12 Kan. 492; *McCurdy* v. *Baker*, 11 Kan. 111.)

Periods of from eleven to twenty-four days intervened between the date of the last publication and the date of election. The Constitution says the publication must be made "for three months previous to the next general election," which means for three months next preceding the election. There should be no interval of time between the date of the last publication and the day of election when there were publications of the paper issued. Publication should have been made in each and every issue of the paper up to the 6th day of November, 1906. The last issue of the paper preceding November 6 should have contained the notice of the proposed amendments. (*Hartley* v. *Croze*, 38 Minn. 325, 37 N. W. 449; *Hellman* v. *Merz*, 112 Cal. 661, 44 Pac. 1079.)

The publication was not made for three months next to and immediately preceding the election. The supreme court of this state, in the case of *Dowty* v. *Pittwood*, 23 Mont. 113, 57 Pac. 727, held that the words, "for at least one year preceding such election," means one year next preceding the election. (See, also, *Russell* v. *Croy*, 164 Mo. 69, 63 S. W. 849.)

The publication of notice of these constitutional amendments was a legal notice required by the express mandate of the Constitution. The publication of it on Sunday and in a Sunday newspaper is illegal, void and amounts to no publication at all. In this state it has been expressly held that the service of a summons on Sunday is void. (*Hauswirth* v. *Sullivan*, 6 Mont. 203, 9 Pac. 798.) It has likewise been held in different jurisdictions that the publication of a legal notice on Sunday is void. (*Ormsby* v. *City of Louisville*, 79 Ky. 197; *Scammon* v. *City of Chicago*, 40 Ill. 146.) The publication of notice of a sheriff's sale in a Sunday newspaper is void. (*Shaw* v. *Williams*, 87 Ind. 158, 44 Am. Rep. 756.) A sale of property for taxes, if made upon a notice published only in a Sunday newspaper, is void, and the rule is too well settled to be now opened

to controversy. (*Schwed* v. *Hartwitz*, 23 Colo. 187, 58 Am. St. Rep. 221, 47 Pac. 295.) Service of notices and affidavits on Sunday is irregular and void. (*Field* v. *Park*, 20 Johns. (N. Y.) 140.) "The weight of authority supports the proposition that the publication, in whole or in part, of a summons or other legal notice, in a newspaper published on Sunday, is void." (37 Cyc. 587; *McChesney* v. *People*, 145 Ill. 614, 34 N. E. 431.)

The secretary of state required the publication to be made once a week only for thirteen weeks, when the Constitution required the publication to be made for three months previous to the election. There should have been a publication of fourteen weeks. (*Savings & Loan Soc.* v. *Thompson*, 32 Cal. 347, 351.) Publication ended on the date of the last insertion of the notice in the paper. (*Calvert* v. *Calvert*, 15 Colo. 390, 24 Pac. 1043; *Banta* v. *Wood*, 32 Iowa, 469; *Foster* v. *Vehmeyer*, 133 Cal. 459, 65 Pac. 974; *Savings & Loan Soc.* v. *Thompson*, 32 Cal. 347, 351.) When the last publication was made in the paper, that was the end of the publication of the notice. It did not continue on for another week; so that when the publication was made commencing on July 27 and ending on October 19, the period from July 27 to October 19 was the period of publication, and none other.

A noncompliance with the provision that the proposed amendments to the Constitution should be published for three months renders the amendment invalid. (*State ex rel. Galusha* v. *Davis*, 20 Nev. 220, 19 Pac. 894.) The action of the secretary of state in changing the wording of the Constitution and making the publication only once a week for thirteen weeks instead of for three months could not be justified on the ground that it was the previous custom of that office so to do. (*Maxwell* v. *Burns* (Tenn. Ch.), 59 S. W. 1067.)

Mr. D. M. Kelly, Attorney General, for Respondent, and *Messrs. Walsh, Nolan & Scallon* filed a brief; *Mr. C. B. Nolan* argued the cause orally.

Before referring to the cases which discuss the proposition as to whether the subject matter of the initiative and referen-

dum should be submitted in two separate amendments, we might advert to the fact that, so far as we are advised, in the different states where this form of legislation is authorized through constitutional amendment, it has been submitted to the people as if it were a single proposition and has not been submitted as two separate amendments, and, so far as we are advised, up to this time, no objection has been raised that this subject should have been submitted as two separate and distinct propositions.

We do not believe that as to the objection made in this respect there is any merit. The purpose of the amendment was to provide for direct participation by the people in framing legislation. The simple fact that one provision authorizes the initiation of legislation by the people and the other provides for the repeal of legislation does not make the proceedings so foreign to each other as to call for their submission by separate amendments. The subject matter has to do with participation in legislation by the people. Indeed, without a referendum at all, the purpose which it seeks to accomplish could be effected through the initiative. It provides, however, for a speedy method of disposing of obnoxious legislation. The same purpose could be accomplished through the initiative by the enactment of legislation at variance with the legislation intended to be repealed. It cannot be said, then, that the two propositions are so foreign to each other that the provision of the Constitution referred to should require their submission as separate and distinct propositions. (See *Hammond* v. *Clark*, 136 Ga. 313, 38 L. R. A. (n. s.) 77, 71 S. E. 479; *State* v. *Timme*, 54 Wis. 318, 11 N. W. 785; *State* v. *Herried*, 10 S. D. 109, 72 N. W. 93; *Gabbert* v. *Chicago etc. Ry. Co.*, 171 Mo. 84, 70 S. W. 891; *Lobaugh* v *Cook*, 127 Iowa, 181, 102 N. W. 1121; *People* v. *Prevost* (Colo.), 134 Pac. 129; *People* v *Sours*, 31 Colo 369, 102 Am. St. Rep. 34, 74 Pac. 167; *Bethea* v. *Town of Dillon*, 91 S. C. 413, 74 S. E. 983; *Bott* v. *Wurts*, 63 N. J. L. 289, 45 L. R. A. 251, 43 Atl. 744, 881.) This court, in the case of *State* v. *McKinney*, 29 Mont. 375, 1 Ann. Cas. 579, 74 Pac. 1095, discussing the requirement of the Constitution as to what should appear in the title of a

bill, said: "The title is generally sufficient if the body of the Act treats only, directly or indirectly, of the subjects mentioned in the title and of other subjects germane thereto, or of matters in furtherance of or necessary to accomplish the general objects of the bill, as mentioned in the title." And so, we say, in this instance, the initiative and referendum amendment referred to had to do with the subject of legislation directly by the people. The matter of repeal is not so distinct from the matter of the enactment of a law that the two propositions should be separately submitted. It must be borne in mind that the scheme contemplated by the amendment in question was intended to repose in the people the authority to frame legislation, and the exercise of this authority efficiently would, of necessity, contemplate the repeal of laws, which, in the judgment of the people, should not be continued in force.

We respectfully submit that this attack upon the amendment on the ground under consideration is without merit, and the authorities to which reference is made by petitioner have very little persuasive effect when we consider the facts to which the decisions in question relate.

The constitutional requirement as to publication requires the secretary of state to cause the amendments to be published in full in at least one newspaper in each county, if any there be, for three months previous to the next general election for members to the legislative assembly. It will be noticed that the provision in question does not require that in the case of daily papers the publication shall appear in each issue; nor does it require that in the case of semi-weekly papers the publication shall appear in each issue published. It will be noted, likewise, that the secretary of state is not required to publish the notices up to the day of election. The only requirement is that he shall cause the amendments to be published in full in at least one newspaper in each county, if such there be, for three months previous to the next general election. With the Constitution indefinite in the matter of publication in the particulars referred

to, the secretary of state expressly required that the publication should be a weekly publication.

This brings us to the consideration in the first place, as to whether or not the publication should appear in the papers up to the time of election, assuming that the publications were made for three months preceding the election, as the provision of the Constitution expressly requires. In the case of *Bethea* v. *Town of Dillon, supra,* the Code of South Carolina provided that twenty days prior to a special election, the books of registration should be opened for registration of the names of the qualified electors, and should remain open for ten days. The books were opened twenty-five days before the election and were kept open for ten days, and it was contended that the bonds could not be legally issued because the election was illegal. It was held that "the slight variance in this case cannot be held to have vitiated the election," since "it does not appear that any qualified elector failed to obtain a registration certificate and the consequent right to vote on account of the variance of the time fixed by the statute. It follows that the irregularity complained of did not affect the result and was therefore immaterial." This proposition is very exhaustively discussed in the case of *Commonwealth ex rel. Attorney General* v. *Griest,* 196 Pa. 396, 50 L. R. A. 568, 46 Atl. 505, where it was held that the provision as to the time of publication was directory merely. (See, also, *State ex rel. Torreyson* v. *Grey,* 21 Nev. 378, 19 L. R. A. 134, 32 Pac. 190; *Hoboken* v. *Gear,* 27 N. J. L. 265; *Russell* v. *Croy,* 164 Mo. 69, 63 S. W. 849.) A clear distinction exists between a case where action is taken before an election is held and where action is taken after the people have declared their purpose at the polls. (*Potter* v. *Furnish,* 46 Mont. 391, 128 Pac. 542; *Reid* v. *Lincoln County,* 46 Mont. 31, 125 Pac. 429.)

It is insisted, however, that in the case of the publication in the "Anaconda Standard," the same appearing in the Sunday issue, such publication was a nullity. This contention is without merit. It is true that in the case of *Hauswirth* v. *Sullivan,* 6 Mont. 203, 9 Pac. 798, it was held by this court that a summons

served on Sunday was a nullity. The doctrine of that case was overruled in the well-considered case of *Burke* v. *Interstate etc. Assn.*, 25 Mont. 315, 327, 87 Am. St. Rep. 416, 64 Pac. 879. Surely, a notice such as we are considering calls for no stricter rules than does a summons, and, under the doctrine of the *Burke Case, supra,* a summons published on Sunday would not be a nullity. (See *Heisen* v. *Smith,* 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 181; likewise *Havens* v. *Stiles,* 8 Idaho, 250, 101 Am. St. Rep. 195, 1 Ann. Cas. 277, 56 L. R. A. 736, 67 Pac. 919.) Filing of complaint on Sunday and the issuance of summons on that day. (*Nixon* v. *City of Burlington,* 141 Iowa, 316, 18 Ann. Cas. 1037, 115 N. W. 239.) The spreading of a judgment on the records on Sunday is a ministerial act and good. (*Puckett* v. *Guenther,* 142 Iowa, 35, 134 Am. St. Rep. 402, 120 N. W. 123.)

Even though the publication is defective in some of the counties referred to, the defect is so slight as to scarcely merit consideration. As we have already stated, the Constitution required the publication to be made in one newspaper at least in each county for three months previous to the next general election. The publication has been made for three months, as we have already shown. Assuming, for the sake of the argument, that in one or two of the counties, computing the time on a calendar month basis, there was a shortage of one or two days, would such a defect invalidate an amendment to the Constitution overwhelmingly adopted? Whatever might be said about such a defect before the election was held, after the people have spoken and spoken so decisively, we insist that public policy would demand that the amendment should stand. The supreme court of Arizona, in the case of *Allen* v. *State,* 14 Ariz. 458, 44 L. R. A. (n. s.) 468, 130 Pac. 1114, favors the principle here advocated.

We insist that an inconsequential departure from the express requirement of the Constitution should be treated as of no effect. In the matter of the publication called for, we insist that a substantial compliance with the requirements of the Constitution suffices, and that the publication in this case in the different counties to which reference is made is substantially in accord

with what the Constitution demands. (See *Nesbit* v. *People*, 19 Colo. 441, 36 Pac. 221; *Prohibitory Amendment Cases*, 24 Kan. 700; *Saunders* v. *Board of Liquidation*, 110 La. 313, 34 South. 457; *State* v. *Herried*, 10 S. D. 109, 72 N. W. 93; *State* v. *Secretary of State*, 43 La. Ann. 590, 9 South. 776; *Worman* v. *Hagan*, 78 Md. 152, 21 L. R. A. 716, 27 Atl. 616; *Taylor* v. *Commonwealth*, 101 Va. 829, 44 S. E. 754; *People* v. *Sours*, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167.)

In support of the proposition that it is not necessary that a publication should be made daily or in every issue of a paper, where such publication is not positively required by Constitution or statute, we refer to the following cases: *Sherwood* v. *Wallin*, 154 Cal. 735, 99 Pac. 191; *Chapman* v. *Zoberlein*, 152 Cal. 216, 92 Pac. 188; *People* v. *Reclamation Dist. No. 136*, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085; *Wood* v. *Knapp*, 100 N. Y. 109, 2 N. E. 632; *Bowen* v. *Argall*, 24 Wend. (N. Y.) 496; *Brewer* v. *City of Springfield*, 97 Mass. 152; *Dayton* v. *Mintzer*, 22 Minn. 393; *In re Harris*, 14 R. I. 637; see, also, *Wilson* v. *Bradley*, 105 Ky. 52, 20 Ky. Law Rep. 1118, 48 S. W. 166, 1088; *Southworth* v. *City of Glasgow*, 232 Mo. 108, Ann. Cas. 1912B, 1267, 132 S. W. 1168. The New York cases above cited, also, support the proposition that a weekly publication counts for six days following the day of publication.

Mr. E. K. Cheadle and *Mr. Wellington D. Rankin*, for Respondent, each submitted a brief and argued the cause orally.

Mr. Jos. M. Dixon and *Mr. Alexander Mackel*, of Counsel.

Opinion: PER CURIAM.

1. The relator's first contention is that the amendment in question is invalid, because not submitted in conformity with the provision of section 9, Article XIX of the Constitution, as follows: "Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately."

From the language of the amendment itself, from the nature of the functions involved, and from historical considerations, it is possible to view the initiative and the referendum as separable propositions and thus to construct an argument of such plausibility as to completely justify the reference of the question to this court, in order that doubt upon the subject should be set at rest. To briefly illustrate: It is suggested by the relator that the amendment itself distinguishes the initiative from the referendum, specifically characterizes them as "the first power" and "the second power," respectively, and prescribes different conditions upon which they may be invoked; that, as submitted, the elector was obliged to accept or reject both, although one of them—the initiative—is wholly legislative in character, and commends itself to minds who might oppose the referendum as calculated to disturb rights vested under enactments of the legislature, while the referendum is a veto, pertains to the executive power, and commends itself to many who might view the initiative as wholly vicious because dispensing with the kind of deliberation supposed to give to enactments of the legislature their principal title to respect; and, finally, that the initiative is neither contemporaneous in origin nor coextensive in use with the referendum; hence their independence of each other is historically established. Suggestive as all this is, it fails to require that the amendment be annulled, for reasons which we proceed to state.

In the case of statutes passed by the legislative assembly and assailed as unconstitutional the question is not whether it is possible to condemn, but whether it is possible to uphold; and we [1] stand committed to the rule that a statute will not be declared unconstitutional unless its nullity is placed, in our judgment, beyond reasonable doubt. (*State* v. *Camp Sing*, 18 Mont. 128, 137, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516.) The application of this rule is especially commended in the case of an amendment to the Constitution solemnly and decisively adopted, the invalidity of which is charged to the method of its submission and made dependent upon a possible theory of its

nature. (*State* v. *Herried,* 10 S. D. 109, 72 N. W. 93; *Koehler* v. *Hill,* 60 Iowa, 543, 14 N. W. 738.) "Constitutions," says Judge Story, "are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." This lan-
[2] guage applies with equal force to amendments, and the fact that an amendment can be separated into two or more propositions concerning the value of which diversity of opinion may exist is not alone decisive. If, in the light of common sense, the propositions have to do with different subjects, if they are so essentially unrelated that their association is artificial, they are not one; but if they may be logically viewed as parts or aspects of a single plan, then the constitutional requirement is met in their submission as one amendment. This was the clear intimation of this court in *State ex rel. Teague* v. *Board of Commissioners,* 34 Mont. 426, 87 Pac. 450, and finds expression in the following authorities from other jurisdictions: *State* v. *Timme,* 54 Wis. 318, 11 N. W. 785; *State* v. *Herried, supra; Gabbert* v. *Chicago, R. I. & P. Ry. Co.,* 171 Mo. 84, 70 S. W. 891; *Lobaugh* v. *Cook,* 127 Iowa, 181, 102 N. W. 1121; *People* v. *Prevost* (Colo.), 134 Pac. 129; *People* v. *Sours,* 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167; *Hammond* v. *Clark,* 136 Ga. 313, 38 L. R. A. (n. s.) 77, 71 S. E. 479; *State* v. *Mason,* 43 La. Ann. 590, 9 South. 776. The unity of subject implicitly required by the provision in question does not essentially differ from the unity of subject required by section 23, Article V, of the Constitution, concerning Acts of the legislative assembly: "No bill, except general appropriation bills, and bills for the codification and general revision of the laws shall be passed containing more than one subject which shall be

clearly expressed in its title." We have repeatedly held that the unity required by this section is served notwithstanding the existence of many provisions in an Act where such provisions are germane to the general subject expressed. (*Hotchkiss* v. *Marion*, 12 Mont. 218, 225, 29 Pac. 821; *State* v. *McKinney*, 29 Mont. 375, 1 Ann. Cas. 579, 74 Pac. 1095; *In re Terrett*, 34 Mont. 325, 331, 86 Pac. 266; *Carlson* v. *City of Helena*, 39 Mont. 82, 17 Ann. Cas. 1233, 102 Pac. 39.) "No provision in a statute," says the supreme court of Missouri, "having natural connection with the subject expressed" in it, "is to be deemed within the constitutional inhibition" that no bill shall contain more than one subject. (*Lynch* v. *Murphy*, 119 Mo. 163, 24 S. W. 774.)

So premising, we return to the amendment in question and observe:

(a) That its submission was in manner and form as prescribed [3] by the legislative assembly. (Laws 1905, p. 139 *et seq.*) In this connection the language of the supreme court of Wisconsin is apt: "There can be no dispute that the two legislatures which agreed to the proposition proceeded upon the theory that the several propositions amounted to but one amendment of the Constitution. They were all included in one resolution adopted by the first legislature, and ratified * * * by the second as one, and they declare it to be but one amendment. * * * We also agree * * * that no amendment can be made to the Constitution without complying with the provisions of section 1, Article XII, above quoted, both in the passage of the amendment by the legislatures and in the manner of the submission. * * * This provision can have but two constructions: First, it may be construed * * * that every proposition in the shape of an amendment to the Constitution which, standing alone, changes or abolishes any of its present provisions, or adds any new provision thereto, shall be so drawn that it can be submitted separately, and must be so submitted. Such a construction would, we think, be so narrow as to render it practically impossible to amend the Constitution; or, if not practically impossible, it would compel the submission of an amendment which, although having but one

object in view, might consist of considerable detail, and each separate provision, though all promotive of the same object and necessary to the perfection and practical usefulness thereof, if adopted as a whole, in such form that a defeat of one of its important matters of detail might destroy the usefulness of all the other provisions when adopted. * * * We think amendments to the Constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other. * * * We do not contend that the legislature, if it had seen fit, might not have adopted these changes as separate amendments and have submitted them to the people as such; but we think, under the Constitution, the legislature has a discretion, within the limits above suggested, of determining what shall be submitted as a single amendment, and they are not compelled to submit, as separate amendments, the separate propositions necessary to accomplish a single purpose." (*State* v. *Timme, supra.*)

(b) Only one provision of the Constitution was changed, to-wit, the provision by which the entire legislative authority of the state had been lodged in the legislative assembly. This fact is not of great importance, but it is important that but one change was made, *viz.:* To express a reservation of legislative authority in the people. That such authority could be used in two ways—designated, respectively, as the power to propose and enact laws, and the power to approve or reject laws enacted by the legislative assembly—does not suggest disconnection, but enumeration of the parts of a whole. Nor is the fact that a greater proportion of the electorate is required for the initiative than for the referendum necessarily significant of more than that one mode of using the reserved authority is deemed of greater value than the other. These provisions are purely detail, which might, without injury to the amendment, have been left for the legisla-

tive assembly to establish. So, too, the referendum, while in political effect a veto, is not such in the sense in which that term is used in our Constitution, and is not an invasion of the executive function. Under it the people proceed toward bills enacted by the assembly, expressing assent or dissent, in essentially the same manner as the Senate upon a bill which has passed the House; they are an additional body through which Acts of the legislature must pass in certain cases, and disapproval, when it occurs, is purely legislative.

(c) It is undoubtedly true that, as the amendment was submitted, persons who approved the initiative, and not the referendum, or *vice versa*, were obliged to take both or neither. But this circumstance is not fatal if they were both parts of a single plan or general purpose; such divergencies of opinion are conceivable as to any amendment involving particularization. "The unity of object is to be looked for in the ultimate end, and not in the detail or steps leading to the end." (*Lobaugh* v. *Cook, supra.*) In this connection the supreme court of South Dakota has spoken in terms which commend themselves to our judgment: "Does the resolution contain more than one amendment, within the meaning of the Constitution? It is contended with much apparent reason that two distinct objects were intended, namely, the abolition of the trustees and a change in the number and powers of the regents; that these objects are independent of each other; that either might have been adopted without adopting the other; and that there are numerous reasons why an elector might have desired one change, and not the other. The defect in this argument consists in substituting for the real object or purpose one of its incidents. Control of the state educational institutions is the subject to which the proposed amendment relates. Its purpose or object is to place such institutions under the control of a single board. The membership of such board, its powers, and the abolition of the local boards are but incidental to and necessarily connected with the object intended. Hence we conclude that only one amendment was submitted." (*State* v. *Herried, supra.*)

(d) After all is said, then, the question is an historical one. Much is made of the fact that the initiative is wholly foreign to our institutions, whereas the referendum has been with us, in one form or another, since early ages; but the referendum established by the amendment in question is the Swiss referendum, and is not the plebiscite resorted to in American practice from the earliest times for the settlement of constitutional or local questions; and while it is a fact that the initiative is the later invention, and does not prevail in all the communities which have the referendum, a very brief glance into political history will disclose that the initiative and the referendum came to us together and at a time when they were considered as essentially complementary. It will readily be recalled that for at least fifteen years prior to 1906 distrust of legislatures as truly representative of popular will was widespread, and there was vigorous agitation for a corrective. The press teemed with discussions of the initiative and referendum, always bracketed together, as a supposed panacea; many states adopted them as one, and there cannot be the slightest doubt that to the common understanding of our people they presented the aspect of a single plan to control the power of the legislature through the means of "direct legislation." (See Oberholtzer on Referendum, Chap. 15; Phelps on Initiative and Referendum.) By them, as the supreme court of California has said, the people reserved to themselves supervisory control of legislation (*In re Pfahler*, 150 Cal. 71, 76, 77, 11 Ann. Cas. 911, 11 L. R. A. (n. s.) 1092, 88 Pac. 270), they are the positive and negative poles of the same magnet—opposite sides of the same shield.

We are cited by the relator to many decisions upon this branch of the case, all of which we have carefully examined. Some of them are not in point; others, invoking principles not materially different from those expressed above, announce results which are manifestly correct; and all serve to illustrate the difficulties and doubts which sometimes surround the application of acknowledged principles to concrete causes. None of them furnish any warrant for us to say that, as a matter of law, the amendment

is clearly unconstitutional because of the method of submission, and we cannot pronounce it void on that account.

2. *Defective Publication.* (a) Publication of the proposed amendment was made but once a week, though in some instances [4] in daily papers and in others in semi-weeklies. The provision of the Constitution which requires publication is to be considered in the light of local history contemporaneous with its adoption. In 1889 there were few newspapers published daily in Montana. The weekly paper was the almost universal medium for the dissemination of current news or information, and when the framers of our Constitution provided for newspaper publication of any proposed amendment, it is but reasonable to suppose they contemplated the medium through which notice would then be given. If publication in a weekly paper in most of the counties would meet the demands of this constitutional provision, then publication for once a week in daily or semi-weekly papers would be sufficient for the same reason. It is to be observed that this provision for publication does not indicate the number of issues of the paper in which the proposed amendment must appear; neither does it designate the character of the paper as monthly, weekly, or daily. These matters were properly left to the control of the legislature or the discretion of the secretary of state, in the absence of legislative action.

Our Constitution is the charter of our government—the body of rules and maxims in accordance with which the powers of sovereignty are exercised. "Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument,

and usurping the proper province of ordinary legislation." (Cooley's Constitutional Limitations, p. 114.) Of necessity, the terms employed in the Constitution are general, and, under the provision requiring publication, a wide latitude is allowed to the secretary of state for the exercise of his discretion. Furthermore, there prevails throughout our theory of state government, as exemplified by the Constitution, the principle of uniformity in all public matters and proceedings wherever possible, and, in the absence of express requirement that the publication shall occur oftener than once a week, control of the subject was referable to the sound discretion of the secretary of state. His adoption of a uniform system of weekly publications, in the absence of any intimation that there was the slightest abuse of discretion, must be held to meet fully the demands made upon him. Under a like constitutional provision this same conclusion was reached in *Hammond* v. *Clark*, above.

(b) *Publication on Sunday.* The publication of the proposed [5] amendment in the Sunday issue of one paper did not vitiate the notice. "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, or of the Codes, is the rule of decision in all the courts of this state." (Rev. Codes, sec. 3552.) It was the rule at common law that Sunday was *dies non juridicus*, but the prohibition involved extended only to acts strictly judicial in character. It had no application whatever to ministerial acts. (27 Am. & Eng. Ency. of Law, 2d ed., 389; 37 Cyc. 583, and numerous cases cited.) In this state Sunday is a legal holiday. (Rev. Codes, sec. 6217.) It has no other distinguishing characteristic in law. In the exercise of its police power, the state has forbidden certain acts to be done on that day, as, for instance, barber-shops to be open for business. There is not any prohibition against the performance of any public act on Sunday, as such. Every holiday—including every Sunday—is qualifiedly a nonjudicial day (Rev. Codes, sec. 6296); but the prohibition of the statute extends only to strictly judicial acts, and some of them are excepted. In the absence of a prohibitory statute, the rule of the

common law prevails, and any ministerial act, such as the publication of the amendment in question, could be done on Sunday and as efficaciously as if done on any other day. (*Heisen* v. *Smith*, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180.)

In the early case of *Hausuirth* v. *Sullivan*, 6 Mont. 203, 9 Pac. 798, it was held that valid service of a summons could not be made on Sunday, but this was overruled when the like question again presented itself in *Burke* v. *Interstate S. & L. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879.

Counsel for relator cite *Ormsby* v. *Louisville*, 79 Ky. 197, *Scammon* v. *Chicago*, 40 Ill. 146, *Shaw* v. *Williams*, 87 Ind. 158, 44 Am. Rep. 756, *Sawyer* v. *Cargile*, 72 Ga. 290, and *Sewall* v. *City of St. Paul*, 20 Minn. 511 (Gil. 459), as supporting their contention; but every one of these cases was decided upon a particular statute held to prohibit the act in question on Sunday. Such cases are not even precedents here, where we do not have such a statute. They also direct our attention to *Schwed* v. *Hartwitz*, 23 Colo. 187, 58 Am. St. Rep. 221, 47 Pac. 295, but the Colorado court is in direct conflict with our own holding in the *Burke Case* above. The decisions of courts of other states are not binding upon us. Precedents are valuable or invaluable as they appeal to our reason, on the one hand, or fail to do so, on the other. We prefer to adhere to the doctrine announced by our own court in the *Burke Case*, as clearly correct in principle and having the support of the decided weight of authority.

Counsel for relator err in assuming that we have an austere statute prohibiting publication of this character on Sunday. They cite section 6220, Revised Codes, identical with section 12 of the same Codes. Each of those two sections reads as follows: "Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed, by law or contract, to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed." Instead of embodying a prohibition, this statute merely provides an extra day of grace. Any of the enumerated acts may be done

lawfully on a holiday, but are in time if not done until the next business day.

(c) It is charged that certain publications ran for less than three months, and certain ones ceased several days before election day. Whether the publication in the last issue of a weekly paper runs forward and serves the purpose of giving continuous notice for the ensuing seven days until the next regular day of publication, or whether the publication is complete for all purposes of imparting notice, upon the day the last issue comes off the press, is not of sufficient consequence at this time to deserve special consideration. Also, for the purposes of this proceeding, it may be admitted that the constitutional requirement for three months' publication previous to the election refers to the three-month period immediately preceding election day; and it may be conceded, further, that in the two respects now under consideration the publication of this proposed amendment in several of the counties was not according to the strict letter of the law, as declared by the Constitution itself in section 9, Article XIX. It would not, however, be argued by anyone that there was not a substantial compliance in every particular, so that, after all, the serious question presented is one of construction.

In the absence of any declaration upon the subject, we would be inclined to hold that, from the very nature of the document itself, every provision of a state Constitution positive in form is mandatory, but in this state we are not left in doubt. "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Mont. Const., Art. III, sec. 29.)

The provision for publication of a proposed amendment falls within the general rule, and, because of this fact, it is insisted that nothing less than an absolute, literal compliance will suffice. **[6]** If this canon of construction be adopted, the amendment under consideration must fail; but law is supposed to be the perfection of reason, and any rule which either offends against every dictate of common sense, or defeats the very object of the provision to which it is applied, ought not to be adopted.

The purpose of requiring publication is manifest: To impart notice to the electors that their fundamental law is sought to be changed, and, as well, the extent of the change. The purpose in requiring such notice to be given immediately before election day is to keep the fact of the proposed change fresh in the minds of those called upon to effect or defeat it at the polls. The section of the Constitution now under immediate consideration, reads as follows: "The secretary of state shall cause the said [7] amendment or amendments to be published in full in at least one newspaper in each county (if such there be) for three months previous to the next general election." (Section 9, Art. XIX.) Must this provision be complied with to the very letter? An illustration or two will suffice to demonstrate the absurdity of applying the rule of *literal compliance:*

(a) Assume that there was absolute compliance with the language above in every county save one, and in that one there was a *bona fide* intention to make the same strict compliance, but on the day of the last publication, which occurred on the day before election, after the type had been set, the forms all arranged, and the presses ready to start, lightning should set fire to the building and destroy the entire plant. Because of this act of God there was not full three months' publication in that one county, and yet, according to the rule or literal compliance, the amendment would fail, even though every qualified elector in that county had notice and actually voted in favor of the amendment.

(b) Again, the amendment must not only be published, but published *in full.* The rule of literal compliance will not permit the omission of a single sentence, phrase, or word. Let us assume again the facts in the illustration above, except that instead of the intervention of an act of God, a careless printer had omitted the word "all" in paragraph 5 of the amendment under consideration, beginning, "All elections on measures referred to the people," *etc.*, and in the last issue of the paper before election that paragraph was made to commence, "Elections on measures referred to the people," *etc.* The omission does not change the meaning of the sentence in the least, and

yet the omission of this single word in a single paper for a single issue prevents a compliance with the very letter of the constitutional provision above, and would, under the rule of literal compliance, defeat the amendment, even though it was adopted by an overwhelming vote and the defect was not discovered for years afterward.

(c) Indeed, to reach the very acme of absurdity, we need only say that the rule of literal compliance requires that every word be spelled correctly, and if in the last illustration the printer inadvertently omitted the letter "a" from the word "measures," and this was the only departure, the amendment would fail under the rule in question. A court which would nullify the expressed will of the people upon such a flimsy pretext as any one illustrated above would deservedly forfeit every claim to the respect or confidence of the community.

But the enforcement of such a rule would also defeat the very purpose of the provision under consideration. Our Bill of Rights declares: "The people of the state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state, and to alter and abolish their Constitution and form of government, whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the Constitution of the United States." (Const., Art. III, sec. 2.) Section 9, Article XIX, deals with but one subject—amendments to the Constitution. In its adoption it was not the purpose of the people to render their fundamental law incapable of change, but, on the contrary, to provide a plain, simple and easily executed method of amendment.

So long as human agencies are to be employed in carrying out the constitutional scheme of amendment, slight errors and defects in procedure are certain to occur, and to impose the rule of literal compliance would, for all practical purposes, render the adoption of any amendment absolutely impossible and defeat one of the very purposes of the Constitution itself. We ought not, by any strained construction, make the language of our Constitution mean something altogether different from what the

people had in contemplation in its adoption. No rule of construction should be invoked which will trammel the people in their efforts to exercise the right reserved to themselves to change their Constitution by popular vote.

In speaking of a slight deviation from the constitutional method of proposing an amendment, the supreme court of Mississippi said: "This objection would have more force if the Act of itself operated as an alteration of the Constitution. But it is merely a *proposition* to be submitted to the action of the people. It is a means provided by which the people may exercise their sovereign right of declaring whether they will change their Constitution or not, thereby establishing the mode in which the government shall be changed, instead of leaving it to unregulated popular impulse. The proposition is presumed to emanate from the people, through their representatives, and is regularly submitted for the action of the whole people. There is nothing in the nature of the submission which should cause the free exercise of it to be obstructed, or that could render it dangerous to the stability of the government; because the measure derives all its vital force from the action of the people at the ballot-box, and there can never be danger in submitting, in an established form, to a free people, the proposition whether they will change their fundamental law. The means provided for the exercise of their sovereign right of changing their Constitution should receive such a construction as not to trammel the exercise of the right. Difficulties and embarrassments in its exercise are in derogation of the right of free government, which is inherent in the people; and the best security against tumult and revolution is the free and unobstructed privilege to the people of the state to change their Constitution in the mode prescribed by the instrument." (*Green* v. *Weller*, 32 Miss. 650.)

If publication of a proposed amendment was one of the successive steps in its adoption, or if universal notice of the proposed amendment throughout the state before election was the *sine qua non* to the valid adoption of such amendment, then some foundation would be laid for argument that the slightest

defect in publication would defeat the effort to amend; but neither of these premises can be insisted upon. The only purpose of publication is to give notice to the electors, and the framers of our Constitution in preparing the draft for submission, and the people in adopting it with a full realization of the fact that they were prescribing only general rules and remitting matters of detail to the legislature or to the discretion of the proper officer, wisely left a margin to cover the frailties of human nature as well as defective machinery for giving notice. Nothing whatever is said as to the number of issues of the newspapers in which the proposed amendment must appear; nothing as to the character of the paper, whether of general or extremely limited circulation, or whether a monthly, weekly or daily; and finally, no provision whatever was made for giving any notice at all to the people of an entire county, if, perchance, there should be such county, in which a newspaper was not published. Since notice was the sole object of publication, all these matters of detail were wisely left for control by legislation or official discretion.

The proper proposal of the amendment by the legislature and the will of the people expressed at the polls in favor of such amendment are clearly emphasized as the factors of paramount importance in effecting a change of our Constitution. (*Constitutional Prohibitory Amendment Cases*, 24 Kan. 700.) Whatever may be said of the rigidity with which the rules of law must be drawn whenever either of these paramount factors is in issue, we are clearly of the opinion that any question which may arise upon other features of the amending process is referable to the rule of substantial compliance, even though the provision of the Constitution invoked is mandatory.

Much confusion has arisen by assuming that every mandatory provision requires literal compliance, while a directory provision only is satisfied with substantial compliance. The terms "mandatory" and "directory" are employed in the same sense, whether applied to statutes or to constitutional provisions. The entire disregard of a provision would not necessarily invalidate

action taken under it if directory, but would if it was mandatory. (Cooley's Constitutional Limitations, p. 109; 36 Cyc. 1157; *Custer County* v. *Yellowstone County*, 6 Mont. 39, 9 Pac. 586.) Any intimation to the contrary in *Evers* v. *Hudson*, 36 Mont. 135, 92 Pac. 462, is merely *dictum*.

In Abbott's Law Dictionary we find this exposition of the words "mandatory" and "directory": "*Mandatory*. The principal technical use of this word is in distinguishing statutes which must be obeyed according to the substantial import of their terms under sanction of having the Act or proceeding adjudged void, from those which ought indeed to be obeyed, but, if disobeyed, do not invalidate what is done under them; which latter class of enactments are called directory." (Abbott's Law Dictionary, 78.)

In *Purdum* v. *Laddin*, 23 Mont. 387, 59 Pac. 153, this court, in considering section 3612, Political Code of 1895, said: "The statute is mandatory, and substantial compliance with its provisions is necessary."

In *Walker* v. *Pennington*, 27 Mont. 369, 71 Pac. 156, we said: "In the judgment of this court the decision in the case of *Purdum* v. *Laddin*, above, has little or no application to the facts in this case; but, so far as the statement contained therein to the effect that the provisions of section 3612, above, are mandatory, and that substantial compliance therewith is necessary to perfect a valid location, is concerned, we have no hesitancy in here reaffirming it."

The rule that substantial compliance with the mandatory provisions of the Constitution for its own amendment is sufficient in the absence of any intimation that injury—substantial or unsubstantial—resulted was adopted by the supreme court of Kansas in *Constitutional Prohibitory Amendment Cases*, above, and by the supreme court of Georgia in *Hammond* v. *Clark*, above.

If these attacks had been made upon the proceedings prior to the election of 1906, doubtless they would have prevailed (*Potter* v. *Furnish*, 46 Mont. 391, 128 Pac. 542); but the general rule

is that every reasonable intendment will be indulged in favor of [8] the validity of a constitutional amendment after its ratification by the people at the polls. (*People* v. *Sours*, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167.)

In *State ex rel. Woods* v. *Tooker*, 15 Mont. 8, 25 L. R. A. 560, 37 Pac. 840, the proposed constitutional amendment under consideration was published but two weeks. The opinion delivered by the court, though covering more than nine printed pages, goes no further than to hold that the provision for publication is mandatory, and that, because the proposed amendment was published but two weeks, it was not legally adopted. No one would contend that two weeks' publication substantially meets the requirement for three months' publication; on the contrary, no one can seriously insist that in every detail the proceedings for publication of the initiative and referendum amendment did not substantially comply with the requirements of section 9, Article XIX, above.

The election returns of 1906 disclose that the proposed amendment was adopted by a vote of 5.5 to 1. That proportion was maintained or exceeded in every county where the publication is called in question, excepting in Cascade, Fergus, and Park counties. The vote in those counties follows:

Counties.	For.	Against.
Beaverhead	1050	135
Cascade	2486	883
Deer Lodge	1346	105
Fergus	1666	494
Gallatin	1856	343
Lewis and Clark	2712	446
Missoula	1087	147
Park	1431	412
Silver Bow	7783	1211
Yellowstone	1128	194

When the proclamation of the Governor was made after the election in 1906, the initiative and referendum amendment became *prima facie* a part of the Constitution of this state (*State*

ex rel. Teague v. *Board*, above), and it ought not now to be set aside and declared inoperative for mere technical departures from the letter of the law, which, in view of the vote cast upon the amendment, could not have affected any substantial right either of this relator or anyone else.

The order to show cause is discharged and this proceeding is dismissed.

Dismissed.

WHITE, RESPONDENT, v. CHICAGO, M. & P. S. RY. CO. ET AL., APPELLANTS.

(No. 3,398.)

(Submitted September 14, 1914. Decided September 29, 1914.)

[143 Pac. 561.]

Personal Injuries—Master and Servant—Railroads—Pleading and Proof—Evidence—Technical Error—Effect—Witnesses—Weight of Evidence—Discretion—Instructions—Statement of Issues—Excessive Verdicts.

Personal Injuries—Pleadings and Proof—Admission of Irrelevant Testimony—Harmless Error.

1. Error in admitting evidence bearing upon defects in the braking appliances and the competency of the engineer in charge of the locomotive attached to the train on which plaintiff switchman was injured, because irrelevant to the issue which was whether the engineer was negligent in moving the train in defiance of a stop signal, *held* to have been rendered harmless by instructions clearly stating the question at issue and that plaintiff could recover only upon proof of the negligence alleged, and not upon proof of any other.

Trial—Evidence—Admissibility—Technical Error—Effect.

2. Technical error in the admission of evidence is not ground for reversal unless it appears that the rights of the party complaining have been prejudiced by it.

Same—Weight of Evidence—Instructions—Singling Out Witnesses—Error.

3. While it is proper for trial courts to caution the jury that in weighing evidence they should consider the interest or bias of witnesses, made apparent by them in testifying, and credit their testimony accordingly, they may not ordinarily single out a particular witness and intimate that by reason of his interest or bias he should be regarded as discredited.

[As to instruction to jury to disregard evidence of witnesses who are competent to testify, see note in 86 Am. Dec. 328.]

Same—Weight of Evidence—Instructions—Discretion.

4. The district court has a wide discretion as to the extent it should go in submitting specific instructions relative to the weight the jury should accord evidence brought to their attention.

[As to what are proper subjects of instructions to jury, see note in 72 Am. Dec. 538.]

Same—Instructions—Statement of Issues.

5. Refusal of a requested instruction embodying a statement of the issues made in the pleadings is not reversible error where, from the charge taken as a whole, the jury could not have been mistaken as to what the issues were.

[As to propriety of instruction referring jury to pleadings to determine issues, see note in Ann. Cas. 1912C, 227.]

Personal Injuries—Excessive Verdicts.

6. *Held*, that a verdict in the sum of $15,000 in favor of a trainman, thirty years of age at the time of the accident and earning $2,100 per annum, for the loss of his left arm below the elbow, was not so large as to force the conclusion that in making the award the jury were influenced by passion and prejudice, rendering a new trial necessary.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Robert H. White against the Chicago, Milwaukee & Puget Sound Railway Company and another. From a judgment in favor of plaintiff and an order denying them a new trial, defendants appeal. Affirmed.

Messrs. George F. Shelton, Fred J. Furman, and *A. J. Verheyen,* for Appellants, submitted a brief; *Mr. Furman* argued the cause orally.

Instruction numbered 10–A, tendered by the defendants and refused by the court, should have been given. It has the sanction of an eminent court. (*Lovely* v. *Grand Rapids & I. Ry. Co.*, 137 Mich. 653, 100 N. W. 894; citing, with approval, *McDonell* v. *Rifle Boom Co.*, 71 Mich. 61, 38 N. W. 681.) It does not comment on any fact in evidence or the testimony of any witness. On the contrary, it simply cautions the jury not to draw unfair inferences. Its refusal is prejudicial error, and, we believe, entitles appellants to a retrial.

Instruction numbered 11–A was a fair statement of the law, not covered by any other instruction, and should have been given on the authority of, among other cases, *Lehane* v. *Butte Electric*

Ry. Co., 37 Mont. 564, 97 Pac. 1038, and cases following that authority.

Instruction numbered 12–A, refused by the court, outlines the issues, presents, without any comment on the facts or any comment on the testimony of any witness, the questions of fact to be determined by the jury, and states the law applicable. This court has repeatedly approved of such an instruction. (*Rand* v. *Butte Electric Ry. Co.*, 40 Mont. 398, 107 Pac. 87, citing and approving *Paxton* v. *Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 3 Ann. Cas. 546, 78 Pac. 215.) *Hardesty* v. *Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29, approves such an instruction, as does *Frederick* v. *Hale*, 42 Mont. 153, 112 Pac. 70. In the case of *Nelson* v. *Boston & Montana etc. Co.*, 35 Mont. 223, 88 Pac. 785, this court declares it to be the duty of a trial judge to fit the instructions to the testimony of the particular case. Here no instruction defined or outlined the issues. *Lynes* v. *Northern Pacific etc. Co.*, 43 Mont. 317, Ann. Cas. 1912C, 183, 117 Pac. 81, approves such an instruction. The case of the *First Nat. Bank of Portland* v. *Carroll*, 35 Mont. 302, 88 Pac. 1012, condemns the giving of an abstract legal doctrine without fitting it to the evidence, the purpose being to enable the jury to see the issues and to understand the law applicable to the facts. A similar instruction was approved in the *Lehane Case, supra.*

The question of damages has vexed this court before, and doubtless it will again, and often. The question was considered at great length in the case of *Flaherty* v. *Butte Electric Ry. Co.*, 43 Mont. 151, 115 Pac. 40. In that case reference is made to *Cleveland etc. Ry. Co.* v. *Hadley*, 170 Ind. 204, 16 L. R. A. (n. s.) 527, 82 N. E. 1025, 84 N. E. 13, as that case is reported in 16 Ann. Cas. 1, and the collation of cases there made. We can add practically nothing to the tables of cases to which the attention of this court has been so frequently called. In the *Flaherty Case*, after due consideration, the court determined the standard of damages for this state. The Flaherty boy had a greater expectancy of life than this plaintiff, and his injuries were graver than plaintiff's. We urge that the verdict in this

case is far in excess of any amount that has heretofore been allowed by this court for similar or equal damages.

In the case of *Rogers* v. *Allen Lumber Co.*, 129 La. 900, 39 L. R. A. (n. s.) 202, 57 South. 166, the court reduced a verdict of ten thousand dollars ($10,000) to seven thousand five hundred dollars' ($7,500). This was the case of a boy nineteen years old, dependent on physical labor, who lost his right hand.

Messrs. Canning & Geagan, for Respondent, submitted a brief; *Mr. M. F. Canning* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff brought this action to recover damages for a personal injury suffered by him during the course of his employment as a switchman by the defendant railway company. The jury awarded him a verdict for $15,000. The defendants have appealed from the judgment entered thereon and an order denying them a new trial.

The accident occurred at about 10:30 o'clock on the evening of August 10, 1912, in the switchyard of the defendant railway company at Butte. The defendant Hupert was in charge of a switch engine. The plaintiff was employed in coupling cars to be moved from place to place about the yard in making up trains. It is alleged in the complaint that it was the duty of plaintiff to couple the engine operated by the defendant Hupert to a line of cars on the defendant company's line of railway; that it was necessary for the plaintiff while doing so to adjust the drawhead on the car to be coupled with the engine, in such a manner that the coupling could be readily made; that while he was so engaged, and without any warning signal to him, and in defiance of a stop signal theretofore given by him to the engineer, the said defendant moved the engine against the plaintiff, causing the injury complained of. The injury is described as the loss by plaintiff of his left arm below the elbow, it having

been crushed between the coupling of the engine and that of the car, to such an extent that amputation of it was necessary.

The defendants by separate answers tendered issue upon all the allegations of the complaint, except that the defendant Hupert and the plaintiff were in the employ of the company. As is usual in such cases, there is much conflict in the evidence as to how the accident occurred, the plaintiff and the defendant Hupert being the only witnesses who testified directly in this behalf. The plaintiff stated that he signaled to Hupert with his lantern, to move the engine slowly forward, which he did; that the engineer bumped the cars, but the knuckles in the coupling failed to engage because the drawhead had been shifted out of line; that the impact drove the line of cars several feet along the track; that the plaintiff, who was riding on the pilot of the engine, thereupon having signaled to Hupert to stop, stepped to the ground and walked forward to adjust the drawhead; and that while he was in the act of putting the drawhead into position with his left hand, Hupert, in disregard of the stop signal, moved the engine forward, with the result that plaintiff's hand and wrist were caught between the knuckles and crushed. The testimony of Hupert directly contradicted that of plaintiff in all essential particulars. He testified that upon a signal from plaintiff to come forward slowly, he did so until he bumped the cars, having had no other signal; whereupon he ascertained from plaintiff's outcry that he had been caught and injured. To quote his own words: "The signal I received was a signal to proceed, that is, keep on coming slow. * * * I should judge that the head end of my engine at that time was about half a car length away or something over twenty feet, probably, from the head end of the car. When I got this signal to come ahead slow I slowed the engine up a little with the air, straight air-valve, and released it and let it drift into the car free. When I hit the car I applied the straight air. The last signal I saw given to me by Mr. White was his signal to keep coming, and I should judge that was possibly ten seconds before I bumped. At the time the engine bumped the gondola I should

judge the engine was going at about the rate of two miles an hour, about an ordinary coupling. During all of the time which elapsed after I came out on to the switch and then started to go east on the lead, I was watching for signals from Robert White. * * * I did not receive a signal to stop on this night. From the time my engine passed the switch going east on the lead until I bumped into the car, the engine did not come to a stop. I bumped into that car once. I never saw any more signals from Mr. White."

The defendants, conceding that the evidence is sufficient to justify a verdict for plaintiff, contend that they were entitled to a new trial because of errors committed by the court in its rulings in admitting and excluding evidence, in refusing requested instructions, and in denying a new trial on the ground that the verdict is excessive.

With reference to the several assignments of error upon the rulings of the court in admitting and excluding evidence, counsel preface their argument with this statement: "While the ruling made in any single instance cited may not have been so prejudicial as to justify appellants in seeking a reversal upon that ground alone, the cumulative effect of these rulings was most prejudicial." Attentive consideration of the assignments, however, has led us to the conclusion that no prejudice was wrought by them, whether they be viewed separately or collectively. For [1] illustration: Counsel for plaintiff were permitted, over objection, to cross-examine Hupert as to how many pounds of air pressure were necessary to stop the engine when going at the speed stated by him, at the time of the accident, and what interval elapsed from the moment the air was applied until the brakes were set. If the injury suffered by the plaintiff had been alleged to have been caused by defect in the brake appliances, the evidence would have been relevant and material. It did not reflect even remotely upon the question at issue, *viz.*, whether the engineer moved the train without a signal and in defiance of the stop signal theretofore given by plaintiff. The inquiry should not have been permitted, but that the defendants did not suffer

prejudice is, we think, made clear when attention is given to these paragraphs of the charge submitted to the jury:

"1–A. You are instructed that the plaintiff's complaint does not allege that there was any defect in the car or the engine, or that any attachment upon either car or engine was defective; and no damages are sought by him on account of any such defect, if any, and therefore this matter is eliminated entirely from your consideration."

"8–A. You are instructed that if you believe from the evidence in this case that as engineer Hupert was running east upon the passing track or lead track immediately prior to the accident, and that the last signal given by the plaintiff in this case was the signal to continue to come ahead slowly, and that pursuant to the signal engineer Hupert did proceed to go ahead slowly, and at no time stopped the engine until the coupling was made with the car, then your verdict must be for the defendants."

"9–A. You are instructed that in this case the plaintiff must prove to your satisfaction, by a preponderance of the evidence, that when engineer Hupert was running eastward upon the lead or passing track, switchman White gave him a signal to stop, and that he did stop; and that thereafter he started the engine again and ran into the car without any order to move ahead and in disregard of the order to stop; or your verdict must be for the defendants."

By these instructions the jury were explicitly directed to ignore the testimony brought out by the examination, and to find for the defendants (1) if they believed the statement of the engineer as to the circumstances of the accident, and (2) if they were not satisfied by a preponderance of the evidence that the plaintiff's statement of the circumstances of the accident was true. The question at issue was thus clearly stated, so that the jury could not fail to understand that plaintiff was entitled to recover only upon proof of the negligence alleged in the complaint, and not upon proof of any other. Aside from this, the evidence brought out was not so substantial as to justify an infer-

ence that the engine was defective in any respect, or not suitable to the purpose for which it was used.

The court permitted counsel for plaintiff to show by this witness that the day of the accident was his "service day" as engineer, that is, that he was then in charge of an engine for the first time. The fact thus brought out was not relevant to the issue on trial, because it related to the competency of the engineer; yet, in view of the instructions quoted above, we do not think prejudice was wrought.

By another ruling, evidence offered to impeach the plaintiff, and perhaps remotely competent for that purpose, was excluded; but we do not think this item of evidence of sufficient substantial value to justify the reversal of the judgment because it was [2] excluded. In the trial of almost every case more or less technical error intervenes. Such error is not ground for reversal unless it appears that the rights of the parties have been prejudiced by it. (Rev. Codes, sec. 6593.) We do not think the final result would have been different had the ruling complained of been otherwise.

It is argued that the court erred in refusing to submit the following instruction: "10–A. You are instructed that you may take the testimony of these railroad men, and you may take into consideration any interest that they might have which would in any way influence their testimony here; but you must not draw any inference unfair to these men, simply because they are in the employ of the railroad company. You should compare and consider their testimony, and that of the plaintiff; consider the interest that each has; then weigh up the testimony of both sides, and see where the truth lies, and what your duty would be in giving weight to their testimony; and then you should find a verdict without any prejudice or sympathy, which will do justice between the parties."

It is always competent for the jury in weighing the evidence to take into consideration the interest any particular witness has in the result of the trial, or any bias he may entertain by reason of his relation to either of the parties, to ascertain

whether such interest or bias has in any degree affected the [3] truth of his statement. It is also competent for the court to caution the jury to consider whether such interest or bias is apparent, and, if so, to weigh and credit the testimony accordingly. The instructions, however, may not ordinarily single out a particular witness and call the attention of the jury to his testimony or circumstances evincing his interest, nor may they intimate either that he is interested or biased or that he is, for this reason, to be regarded as discredited. (*Wastl* v. *Montana Union Ry. Co.*, 17 Mont. 213, 42 Pac. 772.) In any case, the [4] court has a wide discretion as to the extent it should go in submitting specific instructions in this behalf. (Rev. Codes, sec. 8028.) Ordinarily, a general instruction embodying the provisions of the statute (Rev. Codes, sec. 7864) is sufficient. The requested instruction may be assumed to be correct in point of law; nevertheless, we think the purpose of it fully covered by an instruction given, wherein the jury were told that they should determine the credit to be given to the witnesses, after considering the opportunity of the several witnesses for seeing or knowing the things about which they testified; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the case; the relations or connection, if any, between the witnesses and the parties; the apparent consistency, fairness and congruity of their evidence; the probability or improbability of the truth of their several statements in view of all the other evidence, *etc.*

These remarks dispose of the assignments of error upon the refusal by the court of requested instruction 11–A, which would have instructed the jury that while parties are competent witnesses, their interest in the result should be considered in weighing their testimony.

Requested instruction 12–A embodied a statement of the issues made by the pleadings. It is insisted that the refusal to give it [5] was reversible error, and *Rand* v. *Butte Electric Ry. Co.*, 40 Mont. 398, 107 Pac. 87, is cited as conclusive. It was held in this case that it is the better course to pursue for the court to

define clearly the issues submitted, and that in a given case refusal or neglect to pursue this course might be reversible error. But this is not the invariable rule; for though the complaint was made that the court had failed to define the issues, it was held that since the charge, taken as a whole, defined the issues so distinctly that the jury could not have been mistaken as to what they were, the complaint was groundless. Equally without merit is the contention made in this case. Under instructions 8–A and 9–A, *supra*, the jury were informed in terms that could not be mistaken that they should find for the defendants if they did not believe the plaintiff's relation of the circumstances of the accident was true; in other words, they must have understood that the issue was one of veracity as between the plaintiff and engineer Hupert.

At the time of the accident the plaintiff was thirty years of age and in good health. He had been working as a switchman [6] for four years and was earning $175 per month, or $2,100 per annum. His expectancy was 35.33 years. It was shown that an annuity for this amount would cost $40,278. The plaintiff is wholly incapacitated to pursue employment in the railway service or to pursue any occupation wherein effective manual labor is required. It is conceded that the evidence justifies the finding by the jury that the injury was caused by the negligent misconduct of Hupert, the engineer. This concession involves the further concession that plaintiff is entitled to such an amount as will compensate him, not only for the loss of his arm and the resulting disability, but also for the pain and suffering he has undergone, as well as the inconvenience he must endure the remainder of his life. The sum awarded to him is large—perhaps it reaches the limit which the courts have permitted in this class of cases; but once the concession is made that he is entitled to recover at all, there is nothing in the record upon which this court would be warranted in declaring that the jury in fixing the amount which will compensate him, were influenced by any other motive than a conscientious consideration of the facts disclosed. In the very nature of things there can be no

fixed measure of compensation; nor may the award in any given case be accepted as a conclusive standard in any other case, because, it being the province of the jury to determine what the amount shall be, the sums awarded in different cases vary as widely as do the individual views, capacities and dispositions of the men who constitute juries, chosen, as they are, by lot from the body at large of the citizens of the community. So long as we have a system which confides to juries the duty to determine the issues involved in this character of cases and to fix the amount of compensation to be paid, unless the result of their deliberation is such as to shock the conscience and understanding, it must be accepted as conclusive. On this subject we give approval to the following from the text of 1 Graham & Waterman on New Trials, page 451: "It is clear the reason for holding parties so tenaciously to the damages found by the jury in personal torts is, that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury, governed by a sense of justice. It is, indeed, one of the principal causes in which the trial by jury has originated. From the prolific fountain of litigation, numerous cases must daily spring up, calling for adjudication for alleged injuries, accompanied with facts and circumstances affording no definite standard by which these alleged wrongs can be measured, and which from the necessity of the case must be judged of and appreciated by the view that may be taken of them by impartial men. To the jury, therefore, as a favorite and almost sacred tribunal, is committed, by unanimous consent, the exclusive task of examining those facts and circumstances and valuing the injury, and awarding compensation in the shape of damages. The law that confers on them this power and exacts of them the performance of the solemn trust, favors the presumption that they are actuated by pure motives. It therefore makes every allowance for different dispositions, capacities, views and even frailties in the examination of heterogeneous matters of fact, where no criterion can be applied; and it is not until the result of the deliberations of the

jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interpose."

While in *Flaherty* v. *Butte Electric Ry. Co.*, 43 Mont. 141, 115 Pac. 40, *Knuckey* v. *Butte Electric Ry. Co.*, 45 Mont. 106, 122 Pac. 280, and other cases, this court has felt justified, upon the facts disclosed, to reduce the amounts of damages returned by the juries, we do not feel justified by anything in this record to form the conclusion that the jury were influenced by passion and prejudice in finding the facts fixing liability upon the defendants, or in determining the amount which the plaintiff ought to recover.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

VALLEY MERCANTILE CO. ET AL., RESPONDENTS, *v.* ST. PAUL FIRE & MARINE INS. CO., APPELLANT.

(No. 3,395.)

(Submitted September 15, 1914. Decided September 29, 1914.)

[143 Pac. 559.]

Automobiles—Insurance Against Theft—When Insurer not Liable—Larceny—Criminal Intent—Burden of Proof—Evidence—Insufficiency.

Automobiles—Insurance Against Theft—Criminal Intent—Burden of Proof.

1. Before plaintiff could prevail in an action to recover on a policy under the terms of which he was insured against loss by theft of his automobile, he had the burden of proving every element of the crime of larceny, including that of criminal intent in the taker to permanently deprive the owner of his property.

[As to what constitutes larceny, see notes in 57 Am. Dec. 271; 88 Am. St. Rep. 559.]

Same—Evidence—Insufficiency.

2. An automobile which had been insured against damage occasioned by theft was left in a paint-shop by its owner to be repainted. Men employed in the shop appropriated it for the purpose of taking a "joy ride," during the course of which it was injured. *Held* that the taking did not constitute larceny, in the absence of proof of a criminal intent in the takers to permanently deprive the owner of the machine of his property, and that therefore the insurer was not liable.

Appeal from the District Court, Missoula County; J. E. Patterson, Judge.

ACTION by the Valley Mercantile Company and Ralph C. Stiff against the St. Paul Fire & Marine Insurance Company. From a judgment for plaintiffs and from an order denying it a new trial, the defendant appeals. Reversed and remanded, with directions to dismiss the complaint.

Mr. William Wayne, for Appellant, submitted a brief and argued the cause orally.

Mr. Henry C. Stiff, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In November, 1910, the Valley Mercantile Company and Ralph C. Stiff secured a policy of insurance upon their automobile. In April following, while the policy was in full force and effect, the owners placed the car in a paint-shop in Missoula to be repainted, and while there it was taken by Ed. Le Vasseur and Victor Ellis, employees in the paint-shop, and by them driven to De Smet and damaged. Under the terms of the policy the owners were insured against loss in excess of $25 on any single occasion, resulting from the theft of the automobile "by persons other than those in the employ, household or service of the assured." Demand was made upon the insurance company for an amount sufficient to cover the loss, and, upon refusal, this action was instituted. The complaint, after formal recitals relating to the insurance, alleges that "the automobile * * *

was by some person or persons not in the employ of plaintiffs nor in the household or service of plaintiffs or either of them, and without the consent and against the will and wish of plaintiffs, stolen and taken from the place where the same was at the time kept in the city and county of Missoula, state of Montana, and said automobile was by the said person or persons so taking and stealing the same, injured and damaged in the sum and to the extent of four hundred ($400.00) dollars." Issues having been framed, the cause was tried to the court sitting with a jury. A motion for a nonsuit and a motion for a directed verdict were denied. Plaintiffs prevailed and defendant has appealed from the judgment and from an order denying it a new trial.

But one assignment needs to be considered. If the evidence is sufficient to sustain the verdict, the slight errors occurring at the trial ought not to work a reversal of the judgment. If the evidence is insufficient, it is apparent that a new trial would be useless.

A day or two after the automobile was left in the paint-shop Le Vasseur and Ellis at the close of the working day, about 5 P. M., in the absence of the owner of the shop and without his knowledge or consent or the knowledge or consent of the plaintiffs, or either of them, took the automobile from the shop, ran it to a point near De Smet, where an accident occurred which caused considerable damage to the car. A telephone message was sent to a public garage in Missoula for help, and James Hartley responded. When he reached De Smet he found Le Vasseur and Ellis at the broken car—the car headed toward Missoula—and they assisted him in towing it into the city and in replacing it in the paint-shop. Both of these men continued to work at the shop for a considerable time after the injury to the car was discovered by the owners. The owner of the paint-shop locked the front door—the only one through which the automobile could be moved—before he left the shop on the day in question. This was the only evidence which tended to characterize the taking at the time plaintiffs rested and defendant interposed its motion for a nonsuit. On behalf of the defend-

ant, Le Vasseur, one of the men who took the car, testified that it was taken only for a "joy ride" and without any intention of stealing it; that they intended to take a ride about Missoula and restore the car to the paint-shop; that after they had reached a point a short distance beyond the station at De Smet they turned and started back to Missoula; that when opposite the station the car "blew up"; that they immediately telephoned in to the garage in Missoula and waited at the car until Hartley came for them. On cross-examination he testified that they secured gasoline to run the car from the paint-shop; that it belonged to Wilburn, who owned the shop, and was kept for cleaning and for cars in the shop that run short; that they left the shop with the car about 5:30 or 5:45, April 13, in daylight, and were seen by employees of a near-by laundry, and that they took the car at a time when the owner of the shop and the owners of the car would not likely see them. With certain testimony touching the efforts of plaintiffs to effect a settlement, the foregoing is in substance all the evidence produced upon the trial of this cause.

The liability or nonliability of the insurance company depends **[1, 2]** entirely upon the answer to the question, Does this evidence prove that the car was stolen from the paint-shop? It is earnestly contended by counsel for respondents that, the taking being admitted, the question of the intent with which the car was taken was one for the jury's determination; and this is true, provided there is direct evidence of such intention or facts and circumstances from which such intention can be inferred. The only direct evidence of intention is that given by Le Vasseur above. Since this is a civil action, plaintiffs were required to prove their case only by a preponderance of the evidence, but to recover at all they had the burden of proving every element of the crime of larceny. Section 8112, Revised Codes, so far as applicable here, provides: "In every crime or public offense there must exist a union or joint operation of act and intent." The fact that the taking was altogether wrongful and that it was the intention of Le Vasseur and Ellis to appropriate the car to their own use during the ride and to that extent to de-

prive the owners of the use of their property, are not sufficient to constitute their acts larceny. They must have had a criminal intent—the intention to steal the car, without which the act of taking, however reprehensible and wrongful, amounted only to a trespass or a civil wrong.

In *State* v. *Rechnitz,* 20 Mont. 488, 52 Pac. 264, this court adopted the very terse expression of the rule from the court of appeals of New York, as follows: "Every taking by one person of the personal property of another without his consent is not larceny; and this although it was taken without right or claim of right and for the purpose of appropriating it to the use of the taker. Superadded to this there must have been a felonious intent, for without it there was no crime. It would, in the absence of such intent, be a bare trespass, which, however aggravated, would not be crime. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury." (*McCourt* v. *People,* 64 N. Y. 583.)

To constitute the crime of larceny, the intent which accompanies the act of taking must be the criminal intent to deprive the owner of his property, not temporarily, but permanently. In *In re Mutchler,* 55 Kan. 164, 40 Pac. 283, the supreme court of Kansas said: "A felonious intent means to deprive the owner, not temporarily, but permanently, of his own property, without color of right or excuse for the act, and to convert it to the taker's use without the consent of the owner." This is quoted with approval in *State* v. *Shepherd,* 63 Kan. 545, 66 Pac. 236. In *People* v. *Brown,* 105 Cal. 66, 38 Pac. 518, the trial court instructed the jury that larceny may be committed even though it was only the intent of the party taking the property to deprive the owner of it temporarily. Of this instruction the supreme court said: "But the test of law to be applied to these circumstances for the purpose of determining the ultimate fact as to the man's guilt or innocence is: Did he intend to permanently deprive the owner of his property? If he did not intend so to do, there is no felonious intent, and his acts constitute but a trespass. While the felonious intent of the party taking need

not necessarily be an intention to convert the property to his own use, still it must in all cases be an intent to wholly and permanently deprive the owner thereof." Many other cases holding to this same view are collected in the notes in 25 Cyc. 45.

Considered in the light of these rules, the facts stated do not warrant the inference that the car in question was taken by Le Vasseur and Ellis with the criminal intent to deprive the owners of it permanently, and therefore the car was not stolen, and this case does not come within the provision of the insurance policy referred to above. Upon facts very similar this same conclusion was reached in *Bigus* v. *Pacific Coast Casualty Co.*, 145 Mo. App. 170, 129 S. W. 982, *Smith* v. *State* (Tex. Cr. App.), 146 S. W. 547, and *Travelers' Indemnity Co.* v. *Fawkes*, 120 Minn. 353, 45 L. R. A. (n. s.) 331, 139 N. W. 703.

The facts do bring the case clearly within the rule that "where one without permission borrows goods of another intending and having the power to restore or replace them, the taking, although wrongful, does not constitute larceny." (25 Cyc. 49 (i).)

The motion for a directed verdict should have been sustained. The judgment and order are reversed and the cause is remanded, with directions to dismiss the complaint.

Reversed and remanded, with directions.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. METCALF ET AL., RELATORS, v. WILEMAN, COUNTY CLERK, RESPONDENT.

(No. 3,555.)

(Submitted September 28, 1914. Decided October 5, 1914.)

[143 Pac. 565.]

Elections—Ballots — Anti-fusion Statute — Constitutionality — Statutes—Repeal by Implication.

Elections—Ballots—Anti-fusion Statute—Validity of Act.

1. *Held*, that the anti-fusion statute (Laws 1907, p. 120; Rev. Codes, sec. 545) was not impliedly repealed by the primary election law (Laws 1913, p. 570).

Statutes—Repeal by Implication.

2. Repeal of a statute by implication is not favored by the courts.

Same—Repeal by Implication—Rule.

3. To make the claim tenable that an earlier statute was repealed by a later one, the two Acts must be plainly and irreconcilably repugnant to, or in conflict with, each other, must relate to the same subject, and have the same object in view.

[As to repeal of statutes by implication, see notes in 14 Am. Dec. 209; 88 Am. St. Rep. 271.]

Elections—Anti-fusion Statute—Constitutionality.

4. *Held*, that the anti-fusion statute, *supra*, under which the name of a candidate for public office may appear but once upon the official ballot, does not trespass any constitutional provision, and is therefore a valid expression of the legislative will.

Original application by the state, on the relation of George Metcalf and others, for writ of mandate to compel Frank E. Wileman, as clerk and recorder of Granite county, Montana, to print the names of relators on the official ballot for the general election of 1914 in more than one party column. Proceeding dismissed.

Mr. Henry C. Smith and *Mr. George Padbury, Jr.*, for Relators, argued the cause orally.

Mr. D. M. Kelly, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for Respondent; *Mr. Wagner* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the primary election held on August 25, George Metcalf was duly nominated for state senator, Samuel Clark for sheriff, and Hugh T. Cummings for representative, for Granite county by the Progressive, Republican and Socialist parties. The county clerk of Granite county refuses to print their names on the official ballot for the general election in more than one party column; hence this proceeding.

1. The Act of the Tenth Legislative Assembly known as the [1–3] anti-fusion statute (Laws 1907, p. 120; Rev. Codes, sec. 545) specifically prohibits a county clerk from printing a candidate's name on the official ballot for a general election more than once; but it is insisted by counsel for these relators that that Act was repealed by the primary election law, enacted by the people in 1912 (Laws 1913, p. 570). The primary law does not contain any specific repealing provision, but only the general clause: "All Acts or parts of Acts inconsistent with or in conflict with the provisions of this Act are hereby repealed." So, if any repeal was effected, it was only by implication, and such a repeal is never favored by the courts. (*State ex rel. Hay* v. *Hindson*, 40 Mont. 353, 106 Pac. 362.) The following general rules of law are of universal application: "Where two legislative Acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, must govern, although it contains no repealing clause. But it is not sufficient to establish such repeal that the subsequent law covers some, or even all, of the cases provided for by the prior statute, since it may be merely affirmative, or cumulative, or auxiliary. Between the two Acts there must be plain, unavoidable and irreconcilable repugnancy, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy. If both Acts can, by any reasonable construction, be construed together, both will be sustained. Two statutes are not repugnant to each other unless they relate to the same subject. Furthermore, it is necessary to the implication of a repeal

that the objects of the two statutes be the same. If they are not, both statutes will stand, although they may refer to the same subject." (36 Cyc. 1073.)

That the two statutes now under consideration do not fall within the scope of the rules above is manifest. The anti-fusion statute deals exclusively with the official ballot to be used at the general election. The primary law deals exclusively with nominations of candidates to public office. The ballot law of which the anti-fusion statute is a part has nothing to do with nominations, but accepts those legally made, whether by convention, primary or direct petition. The primary law has nothing whatever to do with the official ballot to be used at the general election. It provides only for nominations, leaving all questions of ballot regulation to existing laws. These two statutes do not treat of the same subject and do not have the same object in contemplation. Furthermore, their provisions are not in irreconcilable conflict, or in conflict at all.

It may be conceded that under section 20 of the primary law, a person may be legally nominated for the same office by two or more parties. So, likewise, a person might have been nominated for the same office by conventions representing two or more parties, at any time between 1907 and 1912, and still he could have had his name printed on the official ballot but once. This precise question was disposed of so ably by the supreme court of Illinois, that we quote as follows: "Repeals by implication are never favored, and a subsequent statute will never be held to have repealed a prior statute by implication unless the inconsistency between the two is irreconcilable. The Ballot Act and the Primary Act deal with different subjects. The former relates primarily to the printing and distribution of ballots and the conduct of the general election. It recognized existing methods of nominating candidates by political parties, provided a method for making nominations independent of parties, and concerned itself no further with nominations. It provided that the ballot should be formed from nominations so made, but that a candidate's name, by whatever method he might be nominated,

should appear but once. The Primary Act relates to the nomination of candidates by political parties, and adopts to a great extent for that purpose the machinery of the Ballot Act. It does not concern itself, except incidentally, with the making or distribution of the ballots, the nomination of candidates independent of parties or the conduct of the general election. The declarations of sections 58 and 59 in regard to the placing of the names of candidates upon the official ballot, have reference to the ballot law and were not intended to repeal or change its provisions. The names of all candidates are to be placed by the proper officer upon the official ballot in accordance with the requirement of that law. It was not the intention of the legislature to change those requirements, and nominations made as the result of a primary election are in the same situation with reference to the ballot as were nominations made by political parties in conventions or caucuses before the Primary Act required all such nominations to be made by a primary election." (*People ex rel. Schnackenberg* v. *Czarnecki*, 256 Ill. 320, 100 N. E. 283.)

2. It is further contended that, if the anti-fusion statute was **[4]** not repealed by the primary election law, it is unconstitutional as violating section 1 of our Bill of Rights, and *Hopper* v. *Britt*, 203 N. Y. 144, Ann. Cas. 1913B, 172, 37 L. R. A. (n. s.) 825, 96 N. E. 371, is cited to sustain the position. The New York ballot law considered in that case provided for the circle at the head of the ticket and for a straight party vote by a single mark. It was held that the anti-fusion statute discriminated in favor of the man who desired to vote a straight ticket and whose ticket was complete as against the man who desired to vote a straight ticket and whose ticket was not complete on the ballot, and who must, therefore, make two or more marks to express his will. The gist of the opinion is compressed in a single sentence: "While the Constitution does not guarantee that the elector shall be allowed to express his vote by a single mark, our position is that he is guaranteed the right to express his will by a single mark if other voters are given the right to

express theirs by a single mark and there is no difficulty in according the right to all." We content ourselves with saying that such an argument—if it can be called an argument—does not appeal to us. Our Bill of Rights applies to individuals, not to political parties. "All elections shall be free and open," and, "all elections by the people shall be by ballot," are the guaranties of the Constitution of Montana. But the same Constitution likewise provides: "The legislative assembly shall have the power to pass a registration and such other laws as may be necessary to secure the purity of elections and guard against abuses of the elective franchise." (Art. IX, sec. 9.)

Nearly every state in the Union now has the Australian ballot system in more or less modified form. In the absence of a statute prohibiting it, a candidate may rightfully have his name printed on the official ballot in the party column of every party nominating him. (*Simpson* v. *Osborn*, 52 Kan. 328, 34 Pac. 747; *Fisher* v. *Dudley*, 74 Md. 242, 12 L. R. A. 586, 22 Atl 2; *Miller* v. *Pennoyer*, 23 Or. 364, 31 Pac. 830; *Payne* v. *Hodgson*, 34 Utah, 269, 97 Pac. 132.) But it is an interesting historical fact that after experimenting with laws under which a candidate might have his name printed on the official ballot more than once, many of the states having the Australian system have adopted anti-fusion statutes prohibiting such a thing. Indeed, the people of Montana by direct vote voiced their approval of the anti-fusion principle, for in section 20 of the primary election law they specifically prohibit a candidate before the primary having his name printed on more than one of the several party tickets which make up the primary ballot. Under our election laws the voter is required to express his choice of candidates by a separate mark before the name of everyone for whom he desires to vote; and this may be said to impose some inconvenience upon him. So, likewise, does the law requiring a registration, the law requiring a voter to vote in the precinct of his own residence, the law arbitrarily fixing a time for opening and closing the polls; and, indeed, every measure looking to greater security and purity of election interferes to a greater or less

extent with the voter's convenience. The ideal system, if convenience alone is considered, would provide for a circle at the top of each party column on the official ballot and countenance the straight party ticket voted by a single stroke of the pen. But after experimenting with such a system for a few years, our legislature determined that in the interest of intelligent voting, a change should be made and the circle was eliminated.

In *State ex rel. Scharnikow* v. *Hogan*, 24 Mont. 383, 62 Pac. 5833, this court in considering section 1 of Article III of the state Constitution, said that the declaration: "All political power is vested in and derived from the people," refers as well to the right of naming candidates for public office as it does to the right of the electors to vote for the candidates at the polls. However, our anti-fusion statute does not interfere with either right. If the election is by ballot and is open and free, and every voter has an opportunity to express his choice equally with every other, no complaint can be made legitimately, and regulations designed to protect the ballot and secure fair elections cannot be disregarded merely because they operate to the inconvenience of some voter.

In *People ex rel. Grinnell* v. *Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, it is said: "Elections are free, where the voters are subjected to no intimidation or improper influence, and where every voter is allowed to cast his ballot as his own judgment and conscience dictate. Elections are equal, when the vote of every elector is equal, in its influence upon the result, to the vote of every other elector,—when each ballot is as effective as every other ballot." When the question now under consideration was presented to the supreme court of Utah, that court said: "By the great weight of authority it was within the power of the legislature to declare that the name of a nominee or candidate shall be placed but once on the official ballot." (*Hayes* v. *Ross*, 41 Utah, 580, 127 Pac. 340.)

In each of the following cases an anti-fusion statute similar to our own was upheld: *State ex rel. Bateman* v. *Bode*, 55 Ohio St. 224, 60 Am. St. Rep. 696, 34 L. R. A. 498, 45 N. E. 195;

Todd v. *Election Commrs.*, 104 Mich. 474, 29 L. R. A. 330, 62 N. W. 564, 64 N. W. 496; *State ex rel. Runge* v. *Anderson*, 100 Wis. 523, 42 L. R. A. 239, 76 N. W. 482; *People ex rel. Schnackenberg* v. *Czarnecki*, above; *State ex rel. Fisk* v. *Porter*, 13 N. D. 406, 3 Ann. Cas. 794, 67 L. R. A. 473, 100 N. W. 1080; *State ex rel. Shepard* v. *Superior Court*, 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233. In the last case the supreme court of Washington said: "The error of the relator's reasoning lies in assuming that an elector has an inherent right to vote in his own way, or in the manner of his choice. On the contrary, the law is—and it is declared without division of the courts—that the right to vote is neither a property right nor a right of person, but a mere political privilege which the legislature may regulate to any extent not prohibited by the state or federal constitutions." To the same effect, in principle, is *De Walt* v. *Bartley*, 146 Pa. 529, 28 Am. St. Rep. 814, 15 L. R. A. 771, 24 Atl. 185.

In the absence of some constitutional provision which our anti-fusion statute clearly trespasses, it is our duty to uphold the law. The motion to quash the alternative writ of mandate is sustained and the proceeding is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

OCTOBER TERM, 1914.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,
THE HON. SYDNEY SANNER,
} Associate Justices.

COLE, APPELLANT, *v.* HELENA LIGHT & RAILWAY CO. ET AL., RESPONDENTS.

(No. 3,401.)

(Submitted September 16, 1914. Decided October 6, 1914.)

[143 Pac. 974.]

Personal Injuries—Street Railways—Duty Toward Travelers on Streets — Negligence — Evidence — Insufficiency—Trial—Reopening Case—Discretion.

Complaint—Insufficiency—Appeal—Affirmance of Judgment, When.

1. If the complaint in a case in which defendant prevailed does not state a cause of action, he is entitled to an affirmance of the judgment, irrespective of the merits of plaintiff's contentions on appeal.

[As to the scope and effect of writs of error, see note in 91 Am. Dec. 193.]

Street Railways—Duty Toward Travelers on Streets—Last Clear Chance.

2. It is the duty of a street railway company, through its agents, to exercise constant care and watchfulness to avert injury to travelers on streets traversed by its cars, even though the latter are heedless of their surroundings and thus place themselves in danger; hence an allegation in plaintiff's complaint that while oblivious of her surroundings she unconsciously put herself in peril by driving directly in the way of one of defendant's cars, did not alone relieve defendant company of lia-

bility or conclude plaintiff's right to recover; the question in such case being whether the person in charge of the car exercised the proper care to discover the peril of the traveler and promptly made use of all available appliances to avoid injurying him.

[As to duty of railway company to trespassers on track, see note in 30 Am. St. Rep. 53.]

Same—Evidence—Insufficiency.

3. Where liability for a personal injury was attempted to be fastened upon defendant street railway company on the theory that its motorman, having had the last clear chance to avoid injuring plaintiff, was guilty of want of attention, and the evidence left his dereliction in this respect open to speculation, a directed verdict for defendant was proper.

[As to when contributory negligence does not bar recovery, see notes in 30 Am. Rep. 190; 38 Am. Rep. 637. As to concurrent negligence of plaintiff in defeating recovery under last clear chance doctrine, see note in Ann. Cas. 1912B, 888.]

Trial—Practice—Reopening Case—Discretion.

4. After a case has been closed, the matter of reopening it for the introduction of further evidence is within the discretion of the trial court, and unless there has been a clear abuse of it, its ruling thereon will not be disturbed on appeal.

[As to right of court to reopen case after submission to jury for reception of additional evidence, see note in Ann. Cas. 1913C, 1010.]

Same—Refusal to Reopen Case—When not Error.

5. Refusal to reopen plaintiff's case after defendant's motion for a directed verdict, *held* not to have been error, where the additional testimony sought to be introduced would not have so strengthened his case as to require its submission to the jury.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

ACTION by Mary A. Cole against the Helena Light & Railway Company and Frank Vickery. Judgment for defendants, and plaintiff appeals from it and an order denying her motion for a new trial. Affirmed.

Mr. E. A. Carleton and *Mr. Edward A. Phelan,* for Appellant, submitted a brief and argued the cause orally.

Under the circumstances of this case, the authorities are unanimous that the court should, in the furtherance of justice, have reopened the case upon such terms as were just to both parties. "The trial court is frequently requested at various stages of the trial to reopen the case and to admit evidence which has been overlooked or has been newly discovered." (15 Ency. Pl. & Pr. 397.) While the motion to reopen a case is addressed

to the sound discretion of the court, still such discretion is judicial and not arbitrary. (*Sun Ins. Office* v. *Stegar*, 129 Ky. 808, 112 S. W. 922; see, also, 38 Cyc. 1360; 1 Thompson on Trials, sec. 348; *Meyer* v. *Cullen*, 54 N. Y. 392; *Meacham* v. *Moore*, 59 Miss. 561; *Owen* v. *O'Reilly*, 20 Mo. 603; *Walker* v. *Walker*, 14 Ga. 242.) "Even where the plaintiff has rested and the court has decided to direct a verdict for defendant, the case should be reopened if the plaintiff offers to produce competent evidence sufficient to sustain his case." (Abbott's Civil Jury Trials, 165, and cases cited; *Pittsburgh Plate Glass Co.* v. *Roquemore* (Tex. Civ. App.), 88 S. W. 449.) "Even after the arguments are closed, and while the jury are receiving their instructions, the court may reopen the case for further testimony." (15 Ency. Pl. & Pr. 397; *Clavey* v. *Lord*, 87 Cal. 413, 25 Pac. 493.)

The law proceeds upon the theory that, when a motorman sees that a person approaching the track is unconscious and oblivious of any danger, and neither sees nor hears the car and pays no attention to the signals, it would be inhuman to permit the motorman to run him down and kill or maim him, and, in such a case, he cannot escape liability by the invocation of the place of safety rule. In other words, this is only saying that the law recognizes that notwithstanding the contributory negligence of the plaintiff, the defendant is still liable if, notwithstanding such contributory negligence, the latter had the last clear chance of avoiding the injury, and could have avoided it if he had exercised due and ordinary care. In all such cases the negligence of the defendant is held as the proximate cause of the injury and plaintiff is entitled to recover. (*Richmond Passenger & Power Co.* v. *Gordon*, 102 Va. 498, 46 S. E. 772; *Holden* v. *Missouri Ry. Co.*, 177 Mo. 456, 76 S. W. 973, 2 Street Ry. Rep. 573.) Likewise in the case of *Baxter* v. *St. Louis Transit Co.*, 103 Mo. App. 597, 78 S. W. 70, 2 Street Ry. Rep. 612, it was held that the party who had the last chance to avoid the accident was liable, and that the driver of the vehicle who was injured, although he failed to look back for an approaching car, as did the plaintiff in the case at bar, is not guilty of such negligence as

precludes recovery. It was held that the defendants were liable if the motorman could, or in the exercise of due diligence should, have seen the dangerous situation of the plaintiff and avoided injury. Again, negligence in such cases may be inferred. (*Warren* v. *Union Ry. Co.*, 46 App. Div. 517, 61 N. Y. Supp. 1009; *Peer* v. *Ryan*, 54 Mich. 224, 19 N. W. 961.) A street railway company which runs down a wagon being driven along its tracks, plainly visible in front of the car, is guilty of negligence in the absence of special circumstances. (*Indianapolis Street Ry. Co.* v. *Darnell*, 32 Ind. App. 687, 68 N. E. 609; *Vincent* v. *Norton etc. Ry. Co.*, 180 Mass. 104, 61 N. E. 822; *Schilling* v. *Metropolitan Street Ry. Co.*, 47 App. Div. 500, 62 N. Y. Supp. 403.) If the injury in this case was due to accident, or to no fault of the defendants, they could easily have shown it. This they did not choose to attempt to do. For this reason, say the courts, an inference of negligence may be drawn. (*El Paso Electric Ry. Co.* v. *Kendall*, 38 Tex. Civ. App. 221, 85 S. W. 61.) "While it is the duty of the driver of such a team to use reasonable care for his own safety, he may trust something to the expectation that others will do their duty, and has a right to suppose that a motorman coming from behind will give him time to cross the tracks if he has started to do so." (*Williamson* v. *Old Colony St. Ry. Co.*, 191 Mass. 144, 5 L. R. A. (n. s.) 1081, 77 N. E. 655, 4 Street Ry. Rep. 448; see, also, *Ruppel* v. *United Railroads*, 1 Cal. App. 666, 82 Pac. 1073; *Marden* v. *Portsmouth etc. St. Ry. Co.*, 100 Me. 41, 109 Am. St. Rep. 476, 69 L. R. A. 300, 60 Atl. 530, 3 Street Ry. Rep. 300; *Wall* v. *Helena Street Ry.*, 12 Mont. 44, 29 Pac. 721; *Riley* v. *Northern Pac. Ry. Co.*, 36 Mont. 545, 93 Pac. 948; *Neary* v. *Northern Pac. Ry. Co.*, 37 Mont. 467, 19 L. R. A. (n. s.) 446, 97 Pac. 944; *Flaherty* v. *Butte Electric Ry. Co.*, 43 Mont. 141, 115 Pac. 40; *Singer* v. *Missoula St. Ry. Co.*, 47 Mont. 218, 131 Pac. 630; *Moritz* v. *St. Louis Transit Co.*, 102 Mo. App. 657, 77 S. W. 477; *Vrooman* v. *North Jersey St. Ry. Co.*, 70 N. J. L. 818, 59 Atl. 459, 3 Street Ry. Rep. 619; *Meng* v. *St. Louis etc. Ry. Co.*, 108 Mo. App. 553, 84 S. W. 213; *Union Biscuit Co.* v. *St. Louis Tran-*

sit Co., 108 Mo. App. 297, 83 S. W. 288; *Lightcap* v. *Pennsylvania Traction Co.*, 60 Fed. 212; Nellis on Street Railroad Accident Law, 473.)

Mr. Odell W. McConnell, for Respondents, submitted a brief, and argued the cause orally.

The court did not err in refusing to reopen the case. "It is entirely within the discretion of the court to grant such a request, and unless this discretion is abused, the action of the court affords no ground for a new trial." (15 Ency. of Evidence, 397.) It was necessary for the plaintiff to fully make out her case before she rested. She had no right to rely or expect that the defendants would call the eye-witness Squires, and when they failed to do so, she had no right to have the case reopened. In a will contest (*In re Dolbeer's Estate*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695), the deposition of a witness had been taken by the contestants. The witness had likewise been subpoenaed and was in attendance upon the trial. The contestants did not call the witness nor read the deposition, but took the chance that the proponents would call the witness. The proponents introduced their evidence, but did not call the witness or use the deposition. The contestants then asked leave to reopen the case for the purpose of taking this witness' testimony or of reading the deposition, upon the ground of surprise, and that they expected the proponents would call the witness. The motion to reopen the case was denied by the court, and the court held that there was no error. (See, also, *Bourne* v. *Johnson*, 10 S. D. 36, 71 N. W. 140; *Paducah Ry. Co.* v. *Commonwealth*, 4 Ky. Law Rep. 625; *Wilkie* v. *Richmond Traction Co.*, 105 Va. 290, 54 S. E. 45; *Loftus* v. *Fisher*, 113 Cal. 286, 45 Pac. 329; *Goodrich* v. *Kansas City etc. Ry. Co.*, 152 Mo. 222, 53 S. W. 920; *Bartlett* v. *Illinois Surety Co.*, 142 Iowa, 538, 119 N. W. 729; *Patrick* v. *Perryman*, 52 Ill. App. 514; *Beatson* v. *Bowers*, 174 Ind. 601, 91 N. E. 922.) The motion to reopen the case was not made until twenty-four hours after all of the evidence was in. The defendants had discharged their witnesses and they had returned to their homes, some of them without

the county where this case was tried. Under such circumstances, denial of the motion was not error. (*Peppett* v. *Michigan Cent. R. Co.*, 119 Mich. 640, 78 N. W. 904; *Davis* v. *Central R. R. Co.*, 75 Ga. 645; *Osgood* v. *Bander*, 82 Iowa, 171, 47 N. W. 1001; *Wood* v. *Washington*, 135 Wis. 299, 115 N. W. 810; *Banning* v. *Purrinton*, 105 Iowa, 642, 75 N. W. 639.) In Idaho, the supreme court has said that the practice of allowing cases to be reopened after they have been closed by both parties should be expressly discouraged except upon a showing such as "ignorance of the existence of such evidence, or oversight, inability * * * or other good cause." (*Giffen* v. *City of Lewiston*, 6 Idaho, 231, 55 Pac. 545.) "If the moving party fails to show good cause for reopening the case, it is a proper exercise of discretion to refuse to permit him to do so." (*San Francisco Breweries* v. *Schurtz*, 104 Cal. 420, 38 Pac. 92; 38 Cyc. 1362.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for personal injuries alleged to have been sustained by the plaintiff in a collision between a wagon in which she was riding and a car of the defendant Helena Light & Railway Company, in the city of Helena, brought about by the negligence of the defendant Vickery, the motorman in charge of the car. One line of the railway extends north from the central portion of the city along Park Avenue to its junction with Benton Avenue, and thence north along the latter for several blocks, crossing Lyndale and Wilder Avenues. After leaving the limits of the city, the line extends to the State Fair grounds, situate to the northwest. The collision occurred near the intersection of Benton and Wilder Avenues. Benton Avenue is seventy-six feet in width. The railway at this point has a double track. The space between the outer rail of the track to the east and the curb of the sidewalk is sixteen feet and ten inches. For several hundred feet to the south the avenue is perfectly straight and to the point at which the collision oc-

curred, is nearly level, its grade being 1.51 per cent down toward the north. The plaintiff narrated the circumstances of the accident as follows: During the afternoon of Saturday, September 28, 1912, she was proceeding along Benton Avenue, intending to go to the State Fair grounds to purchase vegetables from the owners of some of the collections of farm products which had been on exhibition at the State Fair during the preceding days of the week. Her wagon was a light spring wagon drawn by a single horse. Cars were passing at short intervals in both directions, and also many vehicles carrying passengers to and from the Fair grounds. After passing Lyndale Avenue the plaintiff overtook a heavy wagon loaded with coal moving along the east side of the street. Being anxious to reach the Fair grounds and observing that the street beyond the coal wagon was free from passengers, she undertook to pass this wagon by driving to the left between it and the car track. Whether the space between the wagon and the track was of sufficient width to permit her to pass without getting upon or in dangerous proximity to the track does not distinctly appear; perhaps the evidence furnishes ground for an inference that she could barely pass with safety. As she was turning in near the track, having slowed her horse down to a walk, she heard the clang of the bell of a car coming from the south, and attempted to turn to the right, but before she could do so the car caught the front wheel of the wagon, with the result that she was thrown from her seat into the body of the wagon by the shock of the collision, suffering the injuries complained of. The wagon was not overturned, the injury done to it being the breaking of the wheel and body, and a part of the coupling gear.

The complaint is prolix and contains much repetition. It is alleged, in substance, that plaintiff, in her haste to reach the Fair grounds, was wholly absorbed in her purpose to accomplish her mission, so far so that she did not observe the approach of the car from behind; that being wholly oblivious of her surroundings she unconsciously put herself in a position of peril

by driving directly in the way of the car; that the defendant Vickery saw the peril of the plaintiff and also that she was wholly unconscious of her condition; and that he nevertheless, by not having the car under control and by permitting it to run at a dangerous rate of speed, negligently and recklessly brought it into collision with plaintiff's wagon.

The defendants by separate answers admitted that plaintiff was injured by the collision as alleged, but by way of denials and counter-averments tendered issue upon all the allegations imputing negligence to them. At the close of plaintiff's evidence the defendants moved the court to direct a verdict in their favor. Pending argument on the motion, counsel for plaintiff requested permission to introduce additional testimony which they deemed material. The request was denied. Thereafter defendant's motion was sustained and judgment ordered accordingly. The plaintiff has appealed from the judgment and an order denying her motion for a new trial.

Counsel for defendants has made the point that, however erroneous may have been the action of the court in directing [1] a verdict, this court may not review it because the complaint does not state facts sufficient to constitute a cause of action. The contention that the complaint is bad is not well made. If this were the case, defendants would be entitled to an affirmance of the judgment and order without further consideration of the appeals. (*Tracy* v. *Harmon,* 17 Mont. 465, [2] 43 Pac. 500; *Shober* v. *Blackford,* 46 Mont. 194, 127 Pac. 329.) We shall consider the argument of counsel in this behalf only so far as to remark that it is not the law, as counsel seems to think, that the allegation that plaintiff, being oblivious of her surroundings, unconsciously put herself in peril by driving directly in the way of the car, is conclusive of her right to recover. Whatever may have been her negligence in this regard, it was nevertheless incumbent upon the defendant Vickery to keep a constant lookout ahead and around for other passengers and vehicles passing along the street, and to use all reasonable care to avoid collision with them. All other per-

sons have a right to the use of a highway in common with the railway company, and since it, and not the casual passenger, is controlling and propelling over it its cars—which are instruments of danger—the duty is cast upon its agents to exercise constant care and watchfulness to avert injury to other persons, even though such persons may become heedless of their surroundings and for this reason get in the way of danger. The duty to discover the perilous situation is commensurate with the duty to avert injury, and when diligence and care in either respect is relaxed and injury results, liability attaches. (*Flaherty* v. *Butte Electric Ry. Co.*, 43 Mont. 141, 115 Pac. 40; 2 Thompson on Negligence, sec. 1476). Any other rule would exonerate the railway company from liability in every case unless it could be made to appear that the motorman actually saw the peril of the passenger and then failed to exert his efforts to avert the collision. In every such case, therefore, the inquiry is: Did the motorman exercise care and watchfulness to discover the peril of the passenger, and did he promptly make use of all the appliances available to avert the injury?

Counsel for plaintiff have assigned error upon several rulings of the court in excluding evidence, and discussed some of them somewhat at length in their brief. We shall not give special notice to any of them, for the reason that such of the excluded evidence as was of substantial value afterward found its way into the case, while that which was finally excluded could not have strengthened plaintiff's case as made.

As we view the evidence as a whole, it was insufficient to make a case for the jury. The case stated in the complaint is that [3] the plaintiff, being wholly oblivious of her surroundings, unconsciously put herself in a position of peril, and that the motorman, having observed her condition, failed to exercise care to prevent a collision. The plaintiff was the only witness who testified as to what the conditions were at the moment of the catastrophe. She had not observed the approach of the car. How near it was at the moment she turned toward the track, she did not state. At what rate of speed it was going did not ap-

pear. Whether it stopped at the moment of the collision or by the force of its own motion passed beyond that point did not appear. The plaintiff did not hear the bell until the moment the collision occurred. There was no suggestion that the motorman did not have his car under full control or was not going at a lawful rate of speed, or that he did not ring the bell so as to give proper warning before plaintiff turned toward the track, or immediately at that time; for in view of her statement in her complaint that she was wholly unconscious of her surroundings, any statement that she did not hear the bell until the moment of the collision did not tend to show that the motorman did not give timely warning. Evidently, until she turned to the left to pass the coal wagon, she was not in the line of danger, and the motorman was not bound to anticipate that she would turn from the place of safety until she began to do so; and so far as anything to the contrary appears, it was then too late for the motorman to avert the collision. He may have been so near when she turned toward the track, that the prompt use of the most approved appliances could not have prevented the collision. Under the rule applicable in this class of cases as stated above, some lapse of duty must have been made to appear before liability could attach; otherwise the happening of an accident resulting in injury to a passenger would be sufficient to make out a *prima facie* case of liability, thus making the railway company an insurer of the safety of every passenger upon the streets from injury by its cars while they are in motion. Under the facts as proven, the question whether the motorman was at fault, or whether the accident was attributable entirely to the want of attention on the part of plaintiff, was left altogether to speculation. This condition of the evidence did not require a submission of the case to the jury; hence a verdict for the defendants was properly directed.

Nor did the court err in refusing to reopen the case for the introduction of additional evidence offered on behalf of plaintiff, as counsel contend. One Ludwick, an experienced motorman called by the plaintiff, was questioned and answered as

follows: "Q. Then, if you were running with the slack in the brake taken up, and you saw danger ahead, and you had a light car, just what have you got to do to stop it? A. While he [the motorman] is approaching and sees the danger, he prepares for an emergency stop by turning off the current and reversing. Q. How long does that take? A. An instant." As appears from the affidavit of counsel in support of their motion to reopen the case, the answer of the witness was understood by them to refer to the time required to bring a car to a full stop under conditions theretofore hypothetically stated. The purpose of having the case reopened was to have the witness state that under the conditions named, the car could have been brought to a full stop within six feet. The conditions hypothetically stated to the witness had not been then, nor were they thereafter, disclosed by the evidence, except that it had appeared that Benton Avenue is nearly level, that the car was a light car, and that it could properly be assumed from the plaintiff's statements of the circumstances of the accident that the defendant Vickery had, some distance (not stated) from the point of collision, seen that plaintiff had gotten within the danger line.

The reopening of a case for the introduction of further [4] evidence after it has been closed is within the discretion of the trial court. Its ruling upon the request to reopen will not be disturbed by the appellate court, unless there has been a clear abuse of discretion. (*Alderson* v. *Marshall,* 7 Mont. 288, 16 Pac. 576; *Schilling* v. *Curran,* 30 Mont. 370, 76 Pac. 998.)

Now, let it be assumed that the court had granted the request of counsel and admitted the evidence; in what respect was [5] plaintiff's case as made aided by it? There was nothing in the evidence to show or tending to show that the defendant Vickery did not bring the car to a full stop within the distance named by Ludwick, after it became apparent that plaintiff had come within striking distance of the car. Every-day experience teaches that a heavy body, such as a street railway car—even a

light one—when moving at a very moderate rate of speed produces a considerable amount of shock, entirely sufficient to break or overturn an ordinary vehicle coming in contact with it and to injure the occupants by causing them to be thrown and perhaps to fall. So far as the evidence discloses, the motorman did everything in his power to avert the collision; and since the offered evidence did not tend in any way to show the contrary, the court did not err in refusing to reopen the case to admit it. There was nothing before it calling for the exercise of discretion.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

Rehearing Denied January 6, 1915.

IN RE MCDONALD ET AL.

(Nos. 3,540, 3,541, 3,542, 3,545, 3,546, 3,547.)

IN RE GILLIS..

(No. 3,551.)

(Submitted September 17, 28, 1914. Decided October 8, 1914.)

[143 Pac. 947.]

Habeas Corpus—State Militia—Martial Law—Power of Governor — Proclamation — Recitals—Conclusiveness—Insurrectionists—Arrest and Detention—Legality—Military Courts—Constitution—Statutes—Repeal.

Martial Law—Insurrection—State Militia—Power of Governor.

1. Under section 5, Article VII, of the Constitution, the governor has authority to proclaim the existence of a state of insurrection in any portion of the commonwealth and to detail the organized militia to suppress such insurrection, and neither the local authorities nor the supreme court may interfere with his determination in the matter, so long as he remains within the limits established by the Constitution.

[As to martial law, see note in Ann. Cas. 1914C, 22. As to martial law other than in time of war, see note in 98 Am. St. Rep. 772.]

Same—Placing Troops in Charge of Local Authorities—Discretion.

2. When the governor deems it advisable to call the state militia into active service to suppress an insurrection in a county, he may under

section 8967, Revised Codes (but need not), place the troops in charge of the local authorities.

Same—Proclamation—Recitals—Conclusiveness.

3. The recitals in the governor's proclamation that an insurrection exists in one of the counties of the state are conclusive, and the conditions thus proclaimed must be presumed to continue until by executive order it shall be otherwise declared.

Same—Arrest and Detention of Insurrectionists—Legality.

4. The state militia, while engaged in suppressing an insurrection pursuant to an order of the governor, may, when necessary to such suppression, arrest the insurrectionists and detain them in custody for delivery to the civil authorities at a time when the necessities of the case no longer require their detention.

Same—Habeas Corpus—Who may Suspend.

5. The suspension of the writ of *habeas corpus* is a legislative and not an executive function.

[As to the authority of *habeas corpus* as paramount to that of all other writs, see note in Ann. Cas. 1914A, 829.]

Same—Power of Governor—Limitations.

6. Though the governor may impose a degree of military rule upon a county in insurrection, he has no power to proclaim absolute martial law, which means the supremacy of the will of the military commander, the abrogation of all constitutional guaranties and state laws, and the conviction of civilians for crime by military commissions, without trial by jury.

[As to *habeas corpus* to inquire into legality of imprisonment by military authority, see note in Ann. Cas. 1914C, 30.]

Same—"Insurrection"—"War."

7. *Held*, that "insurrection" and "war" are not convertible terms.

Same—Military Courts—Unconstitutionality—Defense.

8. The possible prolongation of an insurrection is not any reason for upholding the summary trial of civilians by unconstitutional military courts, upon the argument of convenience that such course is preferable to their indefinite detention in custody.

[As to the distinction between martial law and military law, see note in 92 Am. Dec. 181.]

Same—State Militia—Statutes.

9. An Act which, upon submission to the people for their approval or rejection, is rejected, never was law for any purpose, hence the contention that the statute providing for the state militia (Rev. Codes, secs. 1045–1110) having been repealed by Chapter 145, Laws of 1911, which latter was in turn defeated on referendum, there is now no provision of law for a state militia because the defeat of Chapter 145 did not revive the original Act (Rev. Codes, sec. 122), *held* without merit.

Same—Habeas Corpus—Release of Petitioner—Denial, When.

10. Where an abortive attempt to try and punish petitioner for an alleged violation of the laws of the state is shown by the record, he is not, on *habeas corpus*, entitled to his release, but must be remanded to be dealt with according to law.

Applications for writs of *habeas corpus* by Mitchell McDonald, Owen Smith, Joseph Bradley, D. W. Malone, Ed Ross, James Chapman and Dan Gillis. Complainants remanded to the custody of respondents.

Messrs. Maury, Templeman & Davies and *Mr. I. G. Denny*, for Petitioners, submitted briefs; *Mr. H. L. Maury* and *Mr. Denny* argued the cause orally.

Mr. D. M. Kelly, Attorney General, and *Mr. Jesse B. Roote*, for Respondents, submitted a brief; *Mr. Roote* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On September 1, 1914, the Honorable S. V. Stewart, governor of this state, issued his executive proclamation, as follows:

"PROCLAMATION.

"Whereas, It has become apparent that conditions of lawlessness and defiance of authority prevail in the county of Silver Bow, State of Montana, and that combinations to resist the execution of process exist in said Silver Bow county, and that the power of the county has been exerted and has not been sufficient to enable the officers having process to execute it; and

"Whereas, It has been represented to me by properly constituted authorities that the peace officers of said county are unable to secure service of process and compliance with the law; and

"Whereas, It is made sufficiently to appear to me that peace and quiet cannot be re-established in said county of Silver Bow without the aid of some force other than the present constituted authority of said county;

"Now Therefore, I, S. V. Stewart, as Governor of the State of Montana, under and by virtue of the authority vested in me by the Constitution and the statutes of said state, do hereby proclaim the said county of Silver Bow, State of Montana, to be in a state of insurrection, and do hereby declare that said Silver Bow county, State of Montana, be and is hereby under martial law, and under the jurisdiction of the military authorities of said State of Montana, and such military forces as may be ordered into service to enforce the provisions of this proclama-

tion, shall be under the command of Major Dan J. Donohue, this proclamation to continue until the same shall be revoked or modified.

"And I do hereby call upon all citizens of said county and demand of them that they refrain from any and all acts that may in any way contribute to a continuance of disorder. They should desist from participating in gatherings upon the streets or in public places, mindful always of the danger that attends the assembling of large crowds of the idle and curious and of the fact that the innocent bystander is always in peril in the event of a clash between lawless and the forces of law and order. And I appeal to the sober-minded, peace-loving citizens of said county for co-operation with the proper authorities in any manner that will tend to a restoration of peace and quiet in that community.

"The forces of the state have been sent into said county upon the urgent demands of those who are entitled to be heard in an appeal for protection of life and property, and for the adjustment of conditions that have become intolerable and a stigma upon the fair name of our state. In the pursuit of this end these forces shall know neither organization nor faction, their sole aim being the re-establishment of peace in the county of Silver Bow. In the accomplishment of this purpose they should have the moral support of every person who values the stability of government and the safety of life and property.

"In Witness Whereof I have hereunto set my hand and caused the Great Seal of the State to be affixed.

"Done at Helena, the Capital, this the First Day of September, in the Year of Our Lord One Thousand and Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred Thirty-Ninth.

"(Signed) S. V. STEWART.

"(The Great Seal of the State of Montana.)

"By the Governor.

"A. M. ALDERSON,

"Secretary of State."

In accordance with the above proclamation, military forces of the state under the command of Major Dan J. Donohue, arrived in Silver Bow county, took military possession thereof, and such military possession has since continued and still continues. On the 12th day of September, Mitchell McDonald, Owen Smith, Joseph Bradley, E. W. Malone, Ed Ross and James Chapman filed in this court their petitions for writs of *habeas corpus*, alleging, in substance, that they were being unlawfully detained and restrained of their liberty by the governor and by Major Donohue and certain other military officers of the state who were named as respondents, in that the petitioners had been arrested without warrant and were being held without bail to be tried, without a jury, before an alleged court or tribunal set up by the military authorities, upon charges to the petitioners unknown; and this notwithstanding they had infringed no law and were not members of the organized militia of the state. To these petitions, respondents made return setting forth their official character, the proclamation of the governor, and also a proclamation made by Major Donohue upon his arrival in Silver Bow county with the military forces, and alleging that said county was then in a state of insurrection; that the emergencies of the situation demanded the arrest and detention of the petitioners for the successful accomplishment of the purpose for which said military authorities had been sent into Silver Bow county by the governor, "such detention for the present being necessary to prevent the petitioners from committing overt acts in defiance of the military authority of said military forces"; that the said petitioners were leaders of those engaged in insurrection and had been, and if discharged from arrest would be active participants in fomenting and keeping alive the condition of insurrection existing in Silver Bow county; and that it is the purpose of the respondents to release and discharge petitioners from military arrest as soon as that can safely be done with reference to the suppression of the existing state of insurrection and then surrender them to the civil authorities, to be dealt with in the ordinary course of justice

after such insurrection is suppressed. Upon the return and the evidence taken at the hearing, this court made an order denying the release of petitioners, with leave to re-petition after thirty days, if at that time they had not been delivered to the civil authorities and the courts were then open and able to execute their process. The reasons for that order will be set forth in the course of this opinion.

Thereafter, and on September 24, 1914, Dan Gillis filed his petition for a writ of *habeas corpus*, alleging unlawful detention and restraint by the same respondents, and that such detention and restraint are had and claimed by virtue of a commitment issued on September 21, 1914, by Jesse B. Roote, as major and judge of a certain summary court set up by the military authorities in Silver Bow county, after an alleged trial before said Jesse B. Roote without a jury, upon a charge of assaulting and resisting an officer, and in which said proceeding said Jesse B. Roote assumed to adjudge the petitioner guilty and to render judgment that he be imprisoned in the county jail in Silver Bow county, or any prison in said county, for the term of eleven months and pay a fine of $500; and all this notwithstanding all of the district courts of said Silver Bow county were, during the period covered by said proceeding and since have been, open and actively attending to business including the trial of causes. The effect of the return to this petition is to admit the detention of the petitioner under the commitment above mentioned; and such detention is sought to be defended upon the following grounds: That by the proclamation of the governor, martial law became established in Silver Bow county; that by the proclamation of Major Donohue the summary court above referred to was created, "and it was ordered that all acts which would constitute an offense or offenses under the penal laws of Montana or the ordinances of the city of Butte, as well as any act which would hinder or tend to hinder, delay or obstruct the work of the military forces in restoring order, should be punishable as offenses under the martial law, and that such punishments should be inflicted as in the judgment of said

officer constituting said summary court in cases of minor offenses should be suitable." It is also respectfully claimed "that the supreme court of Montana is without jurisdiction in the premises to discharge said Dan Gillis from arrest and imprisonment by reason of the facts and things hereinbefore recited." It will be readily noted that the position taken by the respondents in the *Gillis Case* is much broader than that presented by the returns in the causes first presented. The respondents now maintain "that the governor, as the chief executive officer of the state, has and had the authority, under the Constitution and statutes of the state, to issue the proclamation referred to, and to order the state troops into the district described therein, and that when the proclamation, as is the case here, declares absolute martial law, that of itself has the effect of suspending all governmental civil tribunals, and that the supreme authority and responsibility of government is thereby vested in the military forces; * * * and such military forces, in the discharge of the duties resting upon them, may establish courts for the trial of offenders who violate military orders or who violate the laws of the state within the troubled zone." The questions thus involved are extremely grave and far-reaching in effect.

A. That the governor had the authority to proclaim a state of [1] insurrection to exist in the county of Silver Bow and to detail the organized militia of this state to suppress such insurrection, is settled by the express language of our Constitution: "The supreme executive power of the state shall be vested in the governor, who shall see that the laws are faithfully executed. The governor shall be commander-in-chief of the militia forces of the state, * * * and shall have power to call out any part or the whole of said forces to aid in the execution of the laws, to suppress insurrection or to repel invasion." (Const., Art. VII, sec. 5.) Nor is there the slightest doubt that, as he must determine so he alone can determine when a state of insurrection exists and when the conditions require the interposition of military aid. Neither this court nor the local

authorities can be the arbiter in such a matter. Not this court, for it exercises judicial functions alone; and not the local authorities, for, although the enforcement of the law is primarily with them, public opinion and official attitude may be dominated by the forces who would take the law into their own hands. In every age and in every country there has come a time when portions of the people, roused to passion by some real or fancied cause, have sought by violence to enforce what they conceived to be their rights. When such an emergency arises it calls for prompt and effective action, for this is a government of law, and no permanent redress of grievances is possible through the wanton destruction of life or property. In such a situation the governor is not to be thwarted and his hands are not to be tied by the judgment of local authorities who may be overconfident or who may be acquiescent. "It may be said that this power is dangerous to liberty and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe and at the same time equally effectual." (*Luther* v. *Borden*, 7 How. 1, 12, 48 L. Ed. 581.) In a case of insurrection it is not merely the local law that is set at naught— **[2]** it is the law of the state. Our Constitution places the responsibility for the maintenance of that law exactly where it belongs; our statutes recognize the fact in the provision that the governor may (but need not) put the militia in charge of the local authorities (Rev. Codes, sec. 8967), and it is the duty of this court to refrain from interference or question, so long as the governor remains within the limits established by the Con- **[3]** stitution. So much being true, the recitals in the proclamation that a state of insurrection existed in the county of Silver Bow cannot be controverted, but must be taken as final and conclusive. (*Martin* v. *Mott*, 12 Wheat, 19, 6 L. Ed. 537; *Luther* v. *Borden*, *supra*; *Moyer* v. *Peabody*, 212 U. S. 78, 53 L. Ed. 410, 29 Sup. Ct. Rep. 235; *Moyer* v. *Peabody*, 148 Fed. 870; *Franks* v. *Smith*, 142 Ky. 232, Ann. Cas. 1912D, 319, 134 S. W. 484; *In re Moyer*, 35 Colo. 159, 117 Am. St. Rep. 189, 12 L. R. A. (n. s.)

979, 85 Pac. 190; *Barcelon* v. *Baker*, 5 Philippines Rep. 87; *Re Boyle*, 6 Idaho, 609, 96 Am. St. Rep. 286, 45 L. R. A. 832, 57 Pac. 706; *Ex parte Moore*, 64 N. C. 802.) For reasons equally cogent, we must presume the conditions, thus proclaimed, to continue until by executive order or proclamation it shall be otherwise declared. (*Barcelon* v. *Baker*, *supra*.)

Premising, then, that Silver Bow county was and is in a state of insurrection, and that the presence of the organized militia [4] was and is necessary to the permanent restoration of order, what has that to do with the arrest and detention of McDonald and his copetitioners? We think it has much to do under any and every theory that may possibly be entertained touching the power of the governor and the militia in cases of insurrection. It was distinctly asserted in the returns and established to our satisfaction by the evidence taken upon the hearing, that McDonald and his copetitioners had not been arrested and were not being held for trial before any court-martial or other military tribunal, but that they had been arrested as leaders and inciters of the insurrection, and were being held as necessary measures for its suppression, to be turned over to the civil authorities for trial as soon as that could safely be done. After a consideration of all that was said in argument and of practically all the accessible literature on the subject, we are convinced that the theory which accords the least power to the governor and to the militia in cases of insurrection is that he acts as a civil officer of the state, and that the military forces under him operate as a sort of major police for the restoration of public order; and we confidently assert that under this theory the arrest and detention, under the circumstances stated, can be justified and must be upheld.

The return to the writs issued on behalf of McDonald and his copetitioners is in exactly the same terms as that presented in the *Moyer Case*, cited above, and touching its efficacy the supreme court of Colorado said: "Are the arrest and detention of petitioner under the facts narrated illegal? When an express power is conferred, all necessary means may be employed

to exercise it, which are not expressly or impliedly prohibited. (1 Story's Constitution, sec. 434.) Laws must be given a reasonable construction, which, so far as possible, will enable the end thereby sought to be attained. So with the Constitution. It must be given that construction of which it is susceptible which will tend to maintain and preserve the government of which it is the foundation, and protect the citizens of the state in the enjoyment of their inalienable rights. In suppressing an insurrection, it has been many times determined that the military may resort to extreme force as against armed and riotous resistance, even to the extent of taking the life of the rioters. Without such authority, the presence of the military in a district under the control of the insurrectionists would be a mere idle parade, unable to accomplish anything in the way of restoring order or suppressing riotous conduct. If, then, the military may resort to the extreme of taking life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to. This is but a lawful means to the end to be accomplished. The power and authority of the militia in such circumstances are not unlike that of the police of a city, or the sheriff of a county, aided by his deputies or *posse comitatus* in suppressing a riot. Certainly such officials would be justified in arresting the rioters and placing them in jail without warrant, and detaining them there until the riot was suppressed. * * * If, as contended by counsel for petitioner, the military, as soon as a rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He could be released on bail, and left free to again join the rioters or engage in aiding and abetting their action, and, if again arrested, the same process would have to be repeated, and thus the action of the military would be rendered a nullity. * * * Again, if it be conceded that, on the arrest of a rioter by the military, he must at once be turned

over to the custody of the civil officers of the county, then the military, in seizing armed insurrectionists and depriving them of their arms, would be required to forthwith return them to the hands of those who were employing them in acts of violence, or be subject to an action of replevin for their recovery, whereby immediate possession of such arms would be obtained by the rioters, who would thus again be equipped to continue their lawless conduct. To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored, would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of the law, nor held without due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress."

After his release, Moyer brought a civil action in the circuit court of the United States for the district of Colorado, to secure damages for his arrest and imprisonment, and that court, in sustaining a demurrer to the complaint, remarked: "The state Constitution enjoined the governor, as such officer, to put down the insurrection. The situation must have been more or less desperate and required prompt action, effective of the purpose. Measures are sometimes necessary under the police power that are severe, such as the summary destruction of property used for an unlawful purpose (*Lawton* v. *Steele,* 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. Rep. 499); such as treating property used in an unlawful traffic as a nuisance (*Mugler* v. *Kansas,* 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; *Kidd* v. *Pearson,* 128 U. S. 1, 32 L. Ed. 346, 9 Sup. Ct. Rep. 6); such as the summary destruction of property to stay conflagration (*Bowditch* v. *Boston,* 101 U. S. 16, 25 L. Ed. 980); such as the sum-

mary destruction of obscene books and diseased cattle (*Sentell* v. *New Orleans etc. R. R. Co.*, 166 U. S. 698, 41 L. Ed. 1169, 17 Sup. Ct. Rep. 693); such as the restraint of personal liberty in passing either into or out of an infected district, for the extermination of contagion (*Compagnie Francaise etc.* v. *Louisiana State Board of Health*, 186 U. S. 380, 40 L. Ed. 1209, 22 Sup. Ct. Rep. 811),—and the prohibitions found in the Fourteenth Amendment have never been construed to be an encroachment on such a proper exercise of that power; neither is it believed that said prohibitions can be so construed as an encroachment upon the exercise of the military power within the lines here indicated—invoked to protect the very life of the social body. In both cases we find their right and justification in the maxim, '*Salus populi, suprema lex.*'" (*Moyer* v. *Peabody*, 148 Fed., *supra.*)

The cause last mentioned was appealed to the supreme court of the United States and was affirmed, Mr. Justice Holmes speaking as follows: "Of course, the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation. Thus summary proceedings suffice for taxes, and executive decisions for exclusion from the country. (*Murray* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372; *United States* v. *Ju Toy*, 198 U. S. 253, 263, 49 L. Ed. 1040, 25 Sup. Ct. Rep. 644.) What, then, are the circumstances of this case? * * * The facts that we are to assume are that a state of insurrection existed and that the governor without sufficient reason but in good faith, in the course of putting the insurrection down, held the plaintiff until he thought that he safely could release him. * * * In such a situation we must assume that he had a right under the state Constitution and laws to call out troops, as was held by the supreme court of the state. The Constitution is supplemented by an Act providing that 'when an invasion of or insurrection in the state is made or threatened, the governor shall order the

national guard to repel or suppress the same.' (Laws 1897, Chap. 63, Art. VII, sec. 2, p. 204.) That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power." (*Moyer* v. *Peabody*, 212 U. S., *supra.*)

The reasoning of these cases, properly understood and strictly confined to its proper sphere, we take to be unanswerable, and to be entirely applicable to the right and duty of the governor and the militia, under our Constitution and laws. The release of McDonald and his copetitioners was therefore denied; but since the justification is necessity, and since it cannot obtain beyond the period of such necessity, we granted leave to reapply, having in mind that the course of events might or might not demonstrate the detention of these petitioners beyond the time indicated to be unnecessary.

B. Does it follow, then, that the governor can suspend the [5] writ of *habeas corpus*, declare martial law and authorize the creation of military tribunals to try citizens for violations of the laws of the state? It should be said in justice to the governor that he has not attempted to suspend the writ of *habeas corpus*, and we should not refer to the subject but for the claim urged upon the return in *Gillis' Case:* that this court is without jurisdiction to order a release. This claim can, of course, have no basis save upon the theory that the governor, having declared martial law, *ipso facto* suspended the writ of *habeas corpus.* Certain decisions were presented which sustain this view (*Ex parte Moore, supra; State* v. *Brown*, 71 W. Va. 519, Ann. Cas. 1914C, 1, 45 L. R. A. (n. s.) 996, 77 S. E. 243; *Ex parte Jones*, 71 W. Va. 567, Ann. Cas. 1914C, 31, 45 L. R. A. (n. s.) 1030, 77 S. E. 1029; *Ex parte Field*, 5 Blatchf. 63, 9 Fed. Cas. 1); but we do not care to discuss them, for it has been the settled law of this country ever since 1807 that the suspension of the writ of *habeas corpus* is a legislative and not an executive function. (*Ex parte*

Bollman, 4 Cranch, 75, 2 L. Ed. 554; *Ex parte Merryman,* Taney, 246, Fed. Cas. No. 9487; *Ex parte Milligan,* 4 Wall. 2, 18 L. Ed. 281; *Johnson* v. *Duncan,* 3 Mart. (La.) 530, 6 Am. Dec. 675; *Ex parte Benedict,* Fed. Cas. No. 1292; *McCall* v. *McDowell,* 1 Abb. (U. S.) 212, Fed. Cas. No. 8673; *In re Kemp,* 16 Wis. 359; *Ex parte Moore, supra.*) If, therefore, the power to suspend that writ must stand or fall with the power to establish absolute martial law, the inference is inevitable that no such *régime* can be established by the executive.

We prefer, however, to rest our conclusion upon other [6] grounds. Absolute martial law, the character of rule which respondents claim to have been established in Silver Bow county, means nothing more nor less than the will of the military commander in the field. It "confers power of arrest, of summary trial and prompt execution; and when it has been proclaimed, the land becomes a camp, and the law of the camp is the law of the land." (Webster, in *Luther* v. *Borden,* 5 Works, 240.) Such is the understanding of it as entertained by counsel for respondents, who in oral argument asserted that it meant the abrogation, for the time being, of all the constitutional guaranties and of all the statutes of the state, and in whose brief we find authorities to similar effect. (*In re Ezeta,* 62 Fed. 972, 1002; *In re Egan,* 5 Blatchf. 319, 8 Fed. Cas. (No. 4303) 367; *Commonwealth* v. *Shortall,* 206 Pa. 165, 98 Am. St. Rep. 759, 65 L. R. A. 193, 55 Atl. 952.) Some logical difficulty might be met in conceiving how a constitutional officer can constitutionally suspend the Constitution, or how any tribunal can try men for the violation of laws whose force and effect are for the time being in abeyance. But we pass these and state the question to be this: Is it possible for the executive, by proclamation or otherwise, to constitutionally establish in this state any form of martial law which will authorize the conviction of a civilian for crime, without trial by jury? The answer may be found in almost every page of Anglo-Saxon history since 1628. Prior to that time the crown had on various occasions attempted to extend the operation of martial law, either by applying it in time of peace

or to nonmilitary persons or to nonmilitary offenses. Finally, the issuance by James I and Charles I of commissions to proceed under martial law for the purpose, not only of maintaining the discipline of the army, but also for bringing to more speedy punishment any crimes of whatsoever nature committed by civilians of a certain class, led to the historic Petition of Right in the year above mentioned. In the debate which occurred in the House of Commons on that occasion, the right to proclaim martial law was thoroughly discussed, and the views of such high authorities as Rolle and Coke were stated by the former as follows: "Martial law is merely for necessity when the common law cannot take place. * * * If an enemy come into any part where the common law cannot be executed, there may martial law be executed. If a subject be taken in rebellion, if he be not slain at the time of his rebellion, he is to be tried afterward and by the common law." Fifty years later, Sir Matthew Hale insisted that "martial law is not a law but something indulged rather than allowed as a law. The necessity of government, order and discipline in an army is that only which can give it countenance. * * * Secondly, this indulged law is only to extend to members of the army and to those of the opposite army, and never may be so much indulged as to be exercised or executed upon others. Thirdly, the exercise of martial law may not be permitted in times of peace when the king's courts are open." (History of the Common Law, Chap. XI.) These words are echoed, with illustrations, by Blackstone, from whom we may always learn the state of the common law at the time our Constitution was adopted. (1 Hammond's Blackstone, 695.) Nor has any other view ever prevailed among the jurists and publicists of England. In *Grant* v. *Gould,* Lord Loughborough said: "Martial law such as is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all." And it is a notable fact that martial law has not been proclaimed in England since 1689—neither in the Jacobite risings nor in the Gordon riots in the eighteenth century, nor in the disturbances which occurred at various times

in the nineteenth century. It is quite true that in Ireland, in 1798, and in the different British colonies since then, martial law has been proclaimed on several occasions, and the right to do so has been the subject of much parliamentary discussion. The prevalent view in these discussions seems to have been the one expressed by Lord Cardwell on the Jamaica troubles of 1867. He said that "while there was properly no such thing as martial law, there was no doubt a law of necessity which required that certain acts should be done for the suppression of the rebellion but not for the punishment of persons concerned in it. * * * The law of necessity to which he had referred was strictly limited in time and operated only for repression and not for punishment." The views above expressed were strongly enforced in 1867 by Justice Blackburn in *Queen* v. *Eyre*, and by Chief Justice Cockburn in *Queen* v. *Nelson*.

The sort of martial law for which respondents now contend is regarded in England as a strictly continental institution. It is applied by declaring the affected locality in "the state of siege" wherein "the constitutional guaranties are suspended." Professor Dicey comments upon it as follows: "This kind of martial law is in England utterly unknown to the constitution. Soldiers may suppress a riot as they may resist an invasion; they may fight rebels just as they might fight foreign enemies; but they have no right under the law to inflict punishment for riot or rebellion." (Dicey, Law of the Constitution, 381.) If they cannot inflict punishment for riot or rebellion, they cannot inflict it for any other offense against the municipal law.

Turning to our own country, we note that when the Constitution was adopted, the common law on the subject was as stated by Justice Blackstone. We may also recall that there was a very keen appreciation and jealousy of their personal rights on the part of our forefathers—a jealousy which had been in part directed to this very subject of martial law by the acts of General Gage in New England and of Governor Dunmore in Virginia. It is also well known that when the national Constitution was submitted to the people, over one-third of the vote

was against it, and many of the favorable votes it received were cast with much misgiving, due to the fact that it did not put in positive terms those safeguards to which the people "had been long accustomed to have interposed between them and the magistrate who exercises sovereign power." (Madison, Annals First Congress, 450.) It was explained that the Constitution was to be a grant of power, and therefore powers not expressly granted were reserved to the people, but "this explanation satisfied not one state." (Bancroft's History Formation of Constitution, p. 383 *et seq.*) The general attitude was expressed by Jefferson, who, after extolling the merits of the new plan, added: "I will now tell what I do not like: First, the omission of a bill of rights, providing clearly and without aid of sophism for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the *habeas corpus* laws, and trial by jury in all matters of fact triable by the laws of the land, and not by the law of nations." (2 Jefferson's Works, 329.) Eight states coupled their assent with a demand for such a bill of rights—thus clearly was it insisted that trial by jury should be guaranteed in every case then triable by jury at the common law; and as the common law did not then authorize violations of the laws of the land to be tried by military commission, it follows that the guaranty of trial by jury as contained in Amendment VI must be taken in this sense.

And such we find to be the result of the adjudicated cases arising under the national Constitution. It would extend this opinion to inordinate length to review them all, and we shall therefore content ourselves with a brief reference to a few whose meaning cannot be doubted. *Smith* v. *Shaw*, 12 Johns. (N. Y.) 257, arose out of an arrest for trial by court-martial during the war of 1812, and the supreme court of New York in disposing of an attempted plea of justification under the martial law said: "It is a general rule that where a court has neither jurisdiction of the subject matter nor of the person, everything done is absolutely void. * * * None of the offenses charged

against Shaw were cognizable by a court-martial except that which related to his being a spy; and if he was an American citizen, he could not be charged with such an offense. He might be amenable to civil authority for treason, but could not be punished under martial law as a spy. There was therefore a want of jurisdiction either of the person or of the subject matter as to all offenses alleged against the plaintiff." To the same effect is *McConnell* v. *Hampton*, 12 Johns. (N. Y.) 243.

Johnson v. *Duncan*, 3 Mart. (La.) 530, 6 Am. Dec. 675, arose out of the declaration by General Jackson of martial law in the city of New Orleans, and the supreme court of Louisiana touching that matter declared: "If it be said that the laws of war, being the laws of the United States, authorize a proclamation of martial law, I answer that in peace or in war no law can be enacted but by the legislative power."

The next war fought upon our own soil was the great rebellion, and, as might have been expected, it gave rise to much controversy and discordance of opinion touching the scope and power of martial law. All this, however, was set at rest by the great decision of the supreme court of the United States in the *Milligan Case*, wherein all that is now asserted by respondents was urged upon the court and from which decision we quote: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving mere pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. * * *

"Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it 'in one supreme court and such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained

and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.' * * *

"Why was he not delivered to the circuit court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress has declared penalties against the offenses charged, provided for their punishment, and directed that court to hear and determine them. * * * If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

"Another guaranty of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the federal Constitution, and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service. * * * All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal jus-

tice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. * * *

"It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the king of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."

As pointed out by an eminent military authority, there is nothing in *Mitchell* v. *Clark*, 110 U. S. 633, 28 L. Ed. 279, 4 Sup. Ct. Rep. 170, or in any subsequent decision of the supreme court, to break the force of the Milligan decision. (Union College Lectures, Clous on Military and Martial Law.)

We are quite aware that as indicated by Chief Justice Marshall in *Barron* v. *Baltimore*, 7 Pet. 243, 8 L. Ed. 672, the guar-

anties contained in the fifth and sixth amendments to the national Constitution are limitations upon the power of the United States, and not upon the power of the states; but the interpretation of them serves to show how they were understood in that behalf and to furnish a guide to the proper understanding of like guaranties contained in Article III of our state Constitution. (*Ex parte Moore, supra; Franks* v. *Smith, supra; Johnson* v. *Duncan, supra; Johnson* v. *Jones,* 44 Ill. 142, 92 Am. Dec. 159; *Sheean* v. *Jones,* 44 Ill. 167; *Carver* v. *Jones,* 45 Ill. 334; *In re Kemp, supra.*)

It is insisted, however, that under all the decisions the executive can establish martial law in time of war when the ordinary [7] tribunals are not open; that an insurrection is war, and that the proof at bar shows the civil tribunals of Silver Bow county to have been closed. When in domestic territory the laws of the land have become suspended, not by executive proclamation but by the existence of war, the executive may supply the deficiency by such form of martial law as the situation requires, but we deny that insurrection and war are convertible terms.

The term "war" is used in the books, not in its popular but in its legal sense, and only the national Congress can declare or recognize the existence of war. There is a very great distinction between insurrection and war. It is this: War is an act of sovereignty, real or assumed; insurrection is not. War makes enemies of the inhabitants of the contending states; but insurrection does not put beyond the pale of friendship the innocent in the affected district. War creates the rights and duties of belligerency, which to a mere insurrection are unknown. Doubtless an insurrection may become war, as was the case with the great rebellion, but it does not become so in the legal sense until the rebellious party assumes political form. This was pointed out by the supreme court of the United States in the *Prize Cases,* 2 Black (U. S.), 635, 673, 17 L. Ed. 459. "In organizing this rebellion, they have *acted as states,* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance

to the federal government. Several of these states have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. * * * It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power." In internal wars the object is to coerce the power opposed to the sovereign, and because such power exercises jurisdiction and control *de facto* and claims it *de jure* over the territory under its sway, it is competent for the sovereign to exercise powers belonging to belligerents at international law. (*Miller* v. *United States*, 11 Wall. 268, 20 L. Ed. 135; *Rose* v. *Himely*, 4 Cranch, 241, 272, 2 L. Ed. 608; *Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454; Taylor, International Public Law, secs. 449, 450.)

How inapplicable all this is to a formless insurrection and how impossible to characterize such a movement as a state of war, with all its powers and immunities, is pointed out by Mr. Justice Nelson in the *Prize Cases* cited: "It has been argued that the authority conferred on the President by the Act of 1795 invests him with the war power. But the obvious answer is, that it proceeds from a different clause in the Constitution and which is given for different purposes and objects, namely, to execute the laws and preserve the public order and tranquillity of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there is any force in this argument, then we are in a state of war with all the rights of war, and all the penal consequences attending it every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection or rebellion; for the nature of the power cannot depend upon the numbers called out. * * * The truth is, this idea of the existence of any necessity for clothing the President with the war power, under the Act of 1795, is simply a monstrous exaggeration."

It was also the general belief when the sixth amendment to the national Constitution was under consideration, that trial by jury could not be denied on account of any mere local disturbance. This is evidenced by the fact that in the first draft of that amendment as presented by Madison, in the second draft as presented by the congressional committee of eleven, and in the third draft as reported by the special committee of three, provision was specifically made for trials by jury out of the vicinage when the vicinage should be in a state of insurrection. (Thorpe, Const. Hist. U. S., vol. II, pp. 199 *et seq.*)

So far as the right to trial by jury in case of insurrection is concerned, it does not seem to us vitally important whether the courts are or are not open when the military appear. It may be granted that courts which are prevented by insurrection from executing their process are not open in contemplation of the law. To open them is a part of the duty devolving upon the military. It was conceded at bar that some of the courts of Silver Bow county are in operation, though it was insisted to be only such as are permitted by the military authorities, the others being closed by their order. No such cloture can be recognized.

We have somewhere met with the argument that because the insurrection may be prolonged, the summary trial of offenders is [8] preferable to their indefinite detention. This is not even an argument from necessity, but from convenience only. We know of but one court of last resort which gives it any countenance and that court we do not choose to follow. Nor are we impressed with the suggestion that military trials are necessary in Silver Bow county because the state of public feeling would render trials by jury ineffective—that the guilty will not be punished. We are loath to believe that the courts and citizenship of that county are so weak as this; but if they are, ample relief is afforded the state by the statutory provisions for change of venue.

Martial law, however, is of all gradations, and although the governor cannot by proclamation or otherwise establish martial law of the character above discussed, he is not barred from de-

claring it in any form. We must therefore assume that in using that phrase in his proclamation, he meant only such degree or form of martial rule as he was constitutionally authorized to impose. As we have seen above, he was authorized to detail the militia to suppress the insurrection and to direct their movements without regard to the civil authorities, and they could in the performance of their work take such measures as might be necessary, including the arrest and detention of the insurrectionists and other violators of the law, for delivery to the civil authorities; but neither he nor the military under him can lawfully punish for insurrection or for other violations of the law. The courts cannot be ousted by the agencies detailed to aid them; nor can their functions be transferred to tribunals unknown to the Constitution.

A very brief notice will suffice for the contention that in consequence of the passage of the Donohue bill by the legislature, **[9]** which was subsequently defeated on referendum, we have no organized militia in this state, and therefore all that has been done was illegal. There is nothing in this. The militia of this state consists of all its able-bodied citizens between the ages of eighteen and forty-five years, with certain exceptions. (Const., Art. XIV, sec. 1.) . The governor was authorized to call any or all of them to quell the insurrection, without regard to whether they belonged to the national guard or not. But we have an organized militia. The passage of the Donohue bill by the legislature was not final and never became effective by virtue of the referendum. It required the approval of the people before becoming a law, and this it never had. If it did not become a law for constructive purposes, it could not be one for repealing purposes. (*State ex rel. Hay* v. *Alderson,* 49 Mont. 387, 142 Pac. 210.)

The trial and commitment of petitioner Gillis were void and his **[10]** detention thereunder cannot be upheld. But he is not entitled to his release. The record discloses an abortive attempt to try and punish him for an alleged violation of the laws of the state. He must, therefore, be remanded to the custody of

respondents to be dealt with according to law. (*In re Jones*, 46 Mont. 122, 126 Pac. 929.) It is so ordered.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied November 5, 1914.

PIERSON, APPELLANT, *v.* DALY, RESPONDENT.

(No. 3,404.)

(Submitted September 17, 1914. Decided October 8, 1914.)

[143 Pac. 957.]

Justices of the Peace—Judgments—Filing and Docketing Abstract—Effect of Procedure—Life of Lien—Jurisdiction—Nonappealable Orders.

Justices' Courts—Abstract of Judgment—Quashing Execution—Nonappealable Order.

1. An order quashing an execution issued by a clerk of the district court on an abstract of a justice's judgment, filed with and docketed by him under section 7057, Revised Codes, and striking such abstract from the files, *held* not a special order after final judgment made appealable by section 7098.

Same—Abstract of Judgment—Effect of Filing and Docketing.

2. The act of filing and docketing an abstract of a justice's judgment with the clerk of the district court, under sections 7057–7059, Revised Codes, does not convert such judgment into a final judgment of the district court, or deprive the justice of jurisdiction over it, the procedure provided for therein being merely a means by which the judgment of the latter may be made a lien upon the real estate of the losing party enforceable by execution in any county in the state.

[As to the docketing of judgments of justices of the peace, see note in 40 Am. Dec. 386.]

Same—Life of Judgment Lien.

3. The life of a lien of a justice's judgment after filing and docketing an abstract thereof with the clerk of the district court, as provided by section 7059, Revised Codes, continues for the period of six years from the date of the judgment and not from the date of the filing and docketing.

Same—Judgment—Quashing of Execution—Jurisdiction.

4. Control of its process is vested exclusively in the court upon whose authority it issues; hence the district court, in entertaining and grant-

ing a motion to quash execution of a justice's judgment issued by a clerk of the district court after an abstract thereof had been filed with and docketed by him, acted without jurisdiction.

[As to power of superior court with respect to justice's judgment where transcript has been filed in that court, see note in Ann. Cas. 1914A, 415.]

Appeal from District Court, Valley County; Frank N. Utter, Judge.

ACTION by C. E. Pierson against T. H. Daly. From an order quashing an execution issued by the clerk of the district court on an abstract of a justice's judgment filed with and docketed by him and striking such abstract from the files, plaintiff appeals. Appeal dismissed.

Messrs. Norris & Hurd, for Appellant, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

Mr. C. A. Spaulding and *Mr. W. F. O'Leary,* for Respondent, submitted a brief; *Mr. Spaulding* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In May, 1912, prior to the 28th, the plaintiff (appellant herein) brought an action before Lee L. Minnick, a justice of the peace at Saco, Valley county, to recover judgment for the sum of $137.93, with interests and costs. Effective service of summons upon the defendant was not secured until August 6, an *alias* summons served on that date being returned and filed on August 9. Thereafter the defendant appeared and filed a plea or objection to the jurisdiction of the justice. On September 25 the objection was overruled and the defendant was given "till October 1, 1912, in which to plead, answer or demur." The defendant did not appear. On October 2 counsel for plaintiff submitted his evidence, and judgment was rendered and entered for the plaintiff for $165.70, with costs taxed at $3.50. On December 7 the plaintiff caused an abstract of the judgment to be filed with the clerk of the district court of Valley county,

respondents to be dealt with according to law. (*In re Jones*, 46 Mont. 122, 126 Pac. 929.) It is so ordered.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied November 5, 1914.

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Same—Abstract of Judgment—Effect of Filing and Docketing.

Section 7056 prescribes the form of the abstract. Section [2] 7057 provides that it may be filed and docketed with the clerk, and that he must note upon it the time of its receipt. Section 7058 declares: "From the time of docketing in the clerk's office execution may be issued thereon by the clerk to the sheriff of any county in the state, in the same manner and with like effect as if issued on a judgment of the district court." Section 7059 provides that a judgment of a justice's court creates no lien upon the lands of the defendant unless the abstract is filed and docketed, and that when it has been filed and docketed, it becomes a lien upon the lands then owned or thereafter acquired by the defendant, until the expiration of six years. Under section 7060, "execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment or his successor in office * * * at any time within six years from the entry of judgment." Taking these provisions all together, the conclusion seems inevitable that it was not the purpose of the legislature in enacting them to convert the judgment of the justice of the peace into a judgment of the district court, and thus lodge in the district court the exclusive, or any, jurisdiction to control the issuance and enforcement of execution thereon. There is nothing in any of the provisions indicating such a purpose. On the contrary, section 7058 merely provides that "execution may be issued by the clerk * * * in the same manner and with like effect as if issued on a judgment of the district court," that is, to any county in the state. Neither this nor the following sections purport to add any quality to the judgment other than to make it a lien upon the lands of the defendant during [3] its life. By the process of filing and docketing, the nature of it is not changed, nor is its life extended. Clearly, the provision in section 7059, for the continuance of the lien, contemplates its continuance for the period of six years from the date of the judgment, and not from the date of the filing and docketing. This is clear from the express provision of section 7060. This limitation must be treated as a limitation also of the time

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Both parties have regarded the order as a special order made [1] after final judgment, and therefore appealable under section 7098 of the Revised Codes. Upon the assumption that this is so depends the power of this court to consider and determine the appeal on the merits; for, while under the provisions of the Constitution on the subject (Art. VIII, secs. 2 and 15), all the decisions of district courts are subject to review by this court by some appropriate procedure, causes may be removed to it by appeal only under the limitations and regulations prescribed by statute. (Rev. Codes, sec. 7096; *Finlen* v. *Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517.) Whether or not, therefore, an appeal lies from the order in question, depends upon an answer to the inquiry whether the order falls within the enumeration of appealable orders found in the statute, section 7098, *supra*. This brings us at once to the further inquiry whether the provisions of the Codes authorizing the filing and docketing of an abstract of a judgment of a justice of the peace with the clerk of the district court convert it into a final judgment of the district court, or are intended merely to devise a method by which the judgment of the justice, as such, may be made a lien upon the real estate of the defendant and enforceable by execution in any county of the state.

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and to be properly docketed in the judgment docket of that court. On April 4, 1913, he caused execution to be issued thereon by the clerk and to be levied by the sheriff upon certain personal property belonging to the defendant, to satisfy the judgment; and thereafter the sheriff was proceeding to make a sale for that purpose. On May 1 the defendant moved the district court to recall and quash the execution and to order the abstract stricken from the files, on the ground that the judgment is void, for that the justice of the peace was without jurisdiction to render it. The court, Hon. John W. Tattan presiding, granted a stay of proceedings pending final hearing. Subsequently, at a hearing had before Hon. Frank N. Utter, the motion was granted. Plaintiff has appealed.

Both parties have regarded the order as a special order made [1] after final judgment, and therefore appealable under section 7098 of the Revised Codes. Upon the assumption that this is so depends the power of this court to consider and determine the appeal on the merits; for, while under the provisions of the Constitution on the subject (Art. VIII, secs. 2 and 15), all the decisions of district courts are subject to review by this court by some appropriate procedure, causes may be removed to it by appeal only under the limitations and regulations prescribed by statute. (Rev. Codes, sec. 7096; *Finlen* v. *Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517.) Whether or not, therefore, an appeal lies from the order in question, depends upon an answer to the inquiry whether the order falls within the enumeration of appealable orders found in the statute, section 7098, *supra*. This brings us at once to the further inquiry whether the provisions of the Codes authorizing the filing and docketing of an abstract of a judgment of a justice of the peace with the clerk of the district court convert it into a final judgment of the district court, or are intended merely to devise a method by which the judgment of the justice, as such, may be made a lien upon the real estate of the defendant and enforceable by execution in any county of the state.

Section 7056 prescribes the form of the abstract. Section [2] 7057 provides that it may be filed and docketed with the clerk, and that he must note upon it the time of its receipt. Section 7058 declares: "From the time of docketing in the clerk's office execution may be issued thereon by the clerk to the sheriff of any county in the state, in the same manner and with like effect as if issued on a judgment of the district court." Section 7059 provides that a judgment of a justice's court creates no lien upon the lands of the defendant unless the abstract is filed and docketed, and that when it has been filed and docketed, it becomes a lien upon the lands then owned or thereafter acquired by the defendant, until the expiration of six years. Under section 7060, "execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment or his successor in office * * * at any time within six years from the entry of judgment." Taking these provisions all together, the conclusion seems inevitable that it was not the purpose of the legislature in enacting them to convert the judgment of the justice of the peace into a judgment of the district court, and thus lodge in the district court the exclusive, or any, jurisdiction to control the issuance and enforcement of execution thereon. There is nothing in any of the provisions indicating such a purpose. On the contrary, section 7058 merely provides that "execution may be issued by the clerk * * * in the same manner and with like effect as if issued on a judgment of the district court," that is, to any county in the state. Neither this nor the following sections purport to add any quality to the judgment other than to make it a lien upon the lands of the defendant during [3] its life. By the process of filing and docketing, the nature of it is not changed, nor is its life extended. Clearly, the provision in section 7059, for the continuance of the lien, contemplates its continuance for the period of six years from the date of the judgment, and not from the date of the filing and docketing. This is clear from the express provision of section 7060. This limitation must be treated as a limitation also of the time

within which the clerk may issue execution; for it is general in its application, making no exception, no matter who is authorized to issue process. Clearly, also, the power of the clerk to issue process is not exclusive, otherwise the authority conferred by section 7060 without limitation would be ineffective. The provisions of sections 7057, 7058 and 7059, therefore, must be construed as providing a means for securing a lien on the lands of the defendant through the judgment of the justice, and as merely authorizing the execution to be issued as an execution issued from the district court. But for these provisions there would be no lien, nor could the execution run to any other county than that in which a judgment is rendered, the limits of jurisdiction of the process of a justice's court being coextensive with those of the county only. (Rev. Codes, sec. 6282.) Hence, though the clerk may issue the execution, he issues it upon the judgment of the justice, as such, and not upon it as a judgment of the district court, made such by transformation of the justice's judgment. The fact that the clerk issues the execution does not devest the justice of his control over it, for the statute does not so provide; and since the control of its process [4] is vested exclusively in the court upon whose authority it issues, the justice has exclusive control of the execution, whether issued by himself or by the clerk, and it is his exclusive province to recall and quash it, if for any reason it ought not to have been issued.

These provisions have been construed in those jurisdictions where similar provisions are in force, as having only the purpose and effect which we have accorded to them. (*Young* v. *Remer*, 4 Barb. 442; *Kerns* v. *Graves*, 26 Cal. 156; *Gates* v. *Lane*, 49 Cal. 266.)

Our conclusion is given support by another consideration. "A motion to quash is not an appropriate or admissible mode of bringing under review the errors or irregularities that may exist in the judgment upon which the execution is issued, unless the judgment is utterly void." (*Town of Hayward* v. *Pimental*, 107 Cal. 386, 40 Pac. 545; *Schultze* v. *State*, 43 Md. 295.) If

the district court by the filing and docketing of the abstract became vested with the power to control the execution, then, by the barest implication, it became vested with the power to review and annul the judgment of the justice by a method not authorized nor contemplated by the Constitution and statutes giving to the district courts appellate jurisdiction over justices' courts. Let it be conceded, therefore, that the judgment is void upon its face. It was incumbent upon the defendant to apply to the justice, by proper motion, to have it set aside, or else, an appeal not being available, to institute the proper special proceeding in the district court for that purpose. He was not entitled to relief by summary application to the appellate court. Hence it must follow that the order is not a special order made after final judgment, within the purview of section 7098, *supra;* nor does it fall within the designation of any of the other orders therein enumerated. It is therefore not appealable, and nothing is left for this court to do but to dismiss the appeal.

The appealable character of the order is not discussed in the brief of counsel, though it was called in question by the court during the course of the argument at the hearing. In view of the fact that the court has no jurisdiction to review the order on appeal, we have, for this reason, deemed it better to decline to review it, rather than, by deciding the questions presented on their merits, to establish a precedent that will prove misleading.

Appeal dismissed.

Dismissed.

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY, being absent, takes no part in the foregoing decision.

CROFT ET AL., RESPONDENTS, *v.* BAIN ET AL., APPELLANTS.

(No. 3,406.)

(Submitted September 18, 1914. Decided October 13, 1914.)

[143 Pac. 960.]

Contribution — Partnership — What Constitutes — Evidence — Insufficiency—Fictitious Name—Disability to Sue—Noncompliance With Statute—Proof Required.

Appeal—Implied Findings.

1. Where the trial court fails to make formal findings, every finding necessary to support its judgment will be implied.

Partnership—Essentials.

2. To constitute an association of two or more persons a copartnership within the meaning of section 5466, Revised Codes, it must be the intention of the parties to carry on some business and to share in the profits, community of interest alone—without power in each member of it to act toward the other in the interchangeable character of principal and agent—being insufficient to create the relationship of copartners.

[As to what constitutes a partnership, see note in 115 Am. St. Rep. 400.]

Same—Evidence—Insufficiency.

3. The bare statement made on the witness-stand by one of a number of persons who jointly bought a stallion, giving their joint and several promissory notes to secure the purchase money, that "there was an association formed among the signers of the notes and those who signed the notes were owners of the shares," was, in the absence of other facts and circumstances disclosing the intention of the parties, insufficient to show the existence of a copartnership; *i. e.*, that the animal was bought for the purpose of hiring for breeding purposes to members of the public for the mutual profit of the purchasers.

[As to when agreements to share profits do not create partnership, see note in 30 Am. St. Rep. 828.]

Same—Contribution—Actions at Law.

4. While a member of a copartnership may not, until an accounting has been had, maintain an action at law against a copartner to recover a balance alleged to be due him on account of transactions arising out of the copartnership, such an action may be prosecuted by an obligor against his co-obligor to compel reimbursement to plaintiff in the latter's proportionate share of the common obligation discharged by him.

[As to actions for contribution not founded on express promise, see note in 98 Am. St. Rep. 31.]

Evidence—Witnesses—Avowal of Ignorance of Fact—Effect.

5. The avowal of ignorance of a fact is not proof of the fact by the witness making the avowal, even though the circumstances indicate that he ought to be informed.

Partnership — Fictitious Name — Disability to Sue — Affirmative Showing Necessary.

6. The disability to maintain certain actions, imposed by section 5505, Revised Codes, upon partners doing business under a fictitious

name, because of failure to file the certificate required by the preceding section, must be affirmatively shown,—a requirement not met by the statement of one copartner to the effect that, so far as he knew, his firm had not complied with the provision of section 5504.

Appeal from District Court, Fergus County; Roy E. Ayres, Judge.

ACTION by J. M. Croft and others against Lee Bain and others. From a judgment in favor of plaintiffs, defendant F. J. Peck appeals. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Oscar O. Mueller and *F. J. Peck,* for Appellants.

Mr. Roy C. Cromer, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On January 19, 1906, the plaintiffs, as copartners under the firm name of Croft Bros. & Company, with fifteen others, among whom was the defendant Peck, executed and delivered to McLaughlin Bros., a copartnership, three joint and several promissory notes for the sum of $1,000 each. These notes were by their terms made payable at the First National Bank at Lewistown—the first on July 1, 1908, and the other two respectively on July 1, 1909, and July 1, 1910, with interest at the rate of six per cent per annum. Prior to maturity the notes were all transferred by McLaughlin Bros. to other parties. Payment of them not having been made at maturity, judgments were secured upon them by the respective holders. These judgments were paid by some of the makers, including the plaintiffs, the latter paying the largest amount. This action was then brought by the plaintiffs to compel certain of their associates to reimburse them in the amounts they had paid more than their proportionate share. Though the plaintiffs made all their associates defendants, recovery is sought against only four of them, *viz.:* S. H. Sutton, John Jelinek, F. J. Peck and C. M. Stubbs. The

complaint sets forth in separate counts the amounts claimed as over-payments on each of the notes, specifying the amounts chargeable to each of the four defendants named, and demands a separate judgment against each of them for the sum alleged to be due from him. So far as the record discloses, the defendant Peck alone was served with summons and appeared to make defense. Judgment was rendered against him only. His answer admits that if any amount can be recovered in this action, there is due from him to plaintiffs only the sum of $138, with interest. It alleges two special defenses: (1) That in December, 1905, the plaintiffs and the defendants entered into a copartnership agreement to purchase a stallion from McLaughlin Bros.; that in pursuance of this agreement they purchased the stallion, to be held and owned by them as copartners, the several notes being executed to secure the payment of the purchase money; that each was to have a share in the earnings of the stallion, in proportion of the amount of the purchase price assumed by him; that by hiring, the stallion has earned a large sum of money; that this sum should have been accounted for and applied to the payment of the notes; that there has never been an accounting had among the copartners; and that the copartnership never having been dissolved, either by agreement or by law, the action cannot be maintained. (2) That the plaintiffs are copartners conducting a business under a fictitious name or designation, not showing the names of the persons interested therein as copartners; that they have not filed with the clerk of the county where the business is conducted a certificate stating in full the names of all the members of the copartnership, nor made publication thereof as required by section 5504 of the Revised Codes, and hence that, under the inhibition declared in section 5505, they cannot maintain this action. Upon these allegations the plaintiffs tendered issue by reply. The cause was submitted to the court without a jury and without request for formal findings. It found generally for the plaintiffs, and awarded them judgment for $138 and costs. The defendant has appealed.

Several questions of practice are presented by counsel for plaintiffs touching the course pursued by counsel for the defendant in the preparation of the bill of exceptions and the transcript. It is also claimed that the transcript is not properly authenticated. We shall not notice the contentions in this behalf, as we do not regard any of them even plausibly meritorious.

Though the court made no formal findings, under the rule [1] which prevails in this state, every finding necessary to support the judgment will be implied. (*Vreeland* v. *Edens,* 35 Mont. 413, 89 Pac. 735; *Bordeaux* v. *Bordeaux,* 43 Mont. 102, 115 Pac. 25.) We must therefore presume that the court found adversely to the defendant upon both the special defenses. Counsel for defendant makes the contention that the findings [2, 3] are contrary to the evidence. In his argument touching the first defense he insists that it is fully established by an admission by James M. Croft, one of the plaintiffs, the only witness who testified at the hearing. The contention is predicated upon the following statement made by Croft on his cross-examination: "The purpose of the notes in this action was to secure payment of a stallion bought of McLaughlin Bros. There was an association formed among the signers of the notes and those who signed the notes were owners of the shares." Counsel assumes that the only conclusion to be drawn from this statement is, that by the purchase the signers of the notes became the owners in common of the stallion, and therefore copartners. But this conclusion is not necessary, nor even permissible, in the absence of proof of other facts and circumstances disclosing what the intention of the parties was. "Partnership is the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." (Rev. Codes, sec. 5466.) Obviously, to constitute an association of two or more persons a copartnership, as between or among themselves, within this definition, the intention must be to carry on some sort of business and to share in the profits. The purpose and character of the association is a matter of intention. (*Hunter* v. *Conrad,* 18 Mont. 177, 44 Pac. 523.) The contract

out of which it arises may be express or implied, and the intention may be inferred from the conduct and dealings of the parties, but all the elements included in the definition must be present to constitute the relation of copartnership. Community of interest in the parties alone is not sufficient; but, as was observed by this court in *Weiss* v. *Hamilton,* 40 Mont. 99, 105 Pac. 74: "To constitute a partnership, there must be such a community of interest as empowers each party to make contracts, incur liabilities, and dispose of the property." The statement of the witness falls far short of showing that the plaintiffs and defendants made the purchase of the stallion to use it for breeding purposes for pay by members of the public, for their mutual benefit, or that it was so used. On the contrary, so far as it furnishes the basis for any inference, it is that the purpose was common use by the purchasers themselves. In any event, there is nothing to indicate that, by express agreement on entering into the association or by agreement implied by the conduct of the parties subsequent to the formation of it, each member of it assumed toward the other the interchangeable relation of principal and agent, which is indispensably necessary to constitute a copartnership. (*Parchen* v. *Anderson,* 5 Mont. 438, 51 Am. Rep. 65, 5 Pac. 588; *Weiss* v. *Hamilton, supra.*) Of course, **[4]** if the evidence disclosed that the agreement or subsequent conduct of the parties created among them the relation of copartners, an action at law could not be maintained by one of them against any of the others to recover a balance alleged to be due from him on account of the transactions of the copartnership, until an accounting had been had and the balance ascertained. (*Riddell* v. *Ramsey,* 31 Mont. 386, 78 Pac. 597; *Boehme* v. *Fitzgerald,* 43 Mont. 226, 115 Pac. 413.) Under the statute, however (Rev. Codes, sec. 4897), the relation of the parties being merely that of joint or joint and several obligors, an action at law can be maintained by one of them against any one of the others, upon the theory that each of them upon assuming the relation impliedly agreed to contribute to every other such sum as the other should be compelled to pay in his behalf.

(*Taylor* v. *Reynolds*, 53 Cal. 686; 9 Cyc. 794.) The question whether all the delinquents may be made defendants in the one action and separate judgments recovered against them is not presented in this case.

Equally without foundation is the assertion of counsel that the evidence clearly establishes the second defense. The only reference to the subject in the evidence is found in the statement **[5, 6]** of plaintiff Croft, in response to a question put to him by counsel for defendant, that, so far as he knew, the firm had not complied with the requirement of the statute. This falls short of affirmative proof of the fact of noncompliance. It goes no further than to evince want of knowledge by the witness of the fact inquired about. To be sure, it appears strange that a member of a firm engaged in business should be ignorant with regard to such a matter. But the avowal of ignorance of a fact is not proof of the fact by the witness making the avowal, even though the circumstances indicate that he ought to be informed. Lack of knowledge on the part of Croft is entirely consistent with the fact that other members of the firm had seen to it that the statute had been fully complied with. The disability imposed by section 5505 for failure to comply with the requirement of section 5504 cannot be of avail to the defendant except upon affirmative allegation and proof. It is in the nature of matter in abatement. (*Reilly* v. *Hatheway*, 46 Mont. 1, 125 Pac. 417; *California Sav. & L. Soc.* v. *Harris*, 111 Cal. 133, 43 Pac. 525.) The inhibition does not destroy the right of action upon which recovery is sought, but merely imposes a disability to maintain the action thereon until the requirement of section 5504 has been complied with.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY, being absent, takes no part in the foregoing decision.

CENTENNIAL BREWING CO., RESPONDENT, *v.* ROULEAU ET AL., APPELLANTS.

(Nos. 3,409, 3,503.)

(Submitted September 18, 1914. Decided October 19, 1914.)

[143 Pac. 969.]

Landlord and Tenant—Unlawful Detainer—Complaint—Termination of Tenancy—Notice—Insufficiency—Repairs and Improvements by Tenant—Estoppel—Treble Damages—Discretion.

Landlord and Tenant—Unlawful Detainer—Complaint.

1. The complaint in an action for unlawful detainer brought under section 7271, subdivision 1, Revised Codes, need not allege that plaintiff was entitled to the possession of the premises at the time of the commencement of the action, or gave notice, or demanded possession before bringing action.

Same—Expiration of Lease—Duty of Tenant.

2. Upon the expiration of the term of his lease, it at once becomes the tenant's duty to restore possession to his landlord, without demand or further notice.

[As to when a tenant is guilty of holding over, see note in 70 Am. St. Rep. 533.]

Same—Complaint.

3. In an action for unlawful detainer brought under subdivision 1 of section 7271, Revised Codes, the complaint must allege specifically that the holding over by defendant is without permission of plaintiff.

Same—Void Lease—Status of Tenant.

4. One who enters into possession of real property under a lease rendered void by the statute of frauds, becomes a tenant at will, which tenancy may be terminated by giving the notice prescribed by section 4502, Revised Codes.

Same—Void Lease—Repairs and Improvements by Tenant—Estoppel.

5. *Quaere:* Where tenants had entered into possession of premises after purchasing the business conducted therein from another lessor, under a lease alleged to have been made by them with the owner for a term of two years, which the latter, however, failed to sign, and thereupon made repairs and improvements upon the property, with knowledge on the part of the owner that they were doing so on the assumption that they could have the lease for two years, was the agreement binding upon the owner even though it had not been fully executed?

Same—Termination of Tenancy—Insufficient Notice.

6. A notice to a tenant that at a day named a certain person would become his landlord and that he should "take due and timely notice and act accordingly," is not such a notice as is required by section 4502, Revised Codes, to be given by a landlord for the purpose of terminating the tenancy.

Same—Treble Damages—Discretion.

7. Under section 7283, Revised Codes, when an unlawful detainer has been proven and damages have been awarded, the trial court has not

any discretion, but must render judgment for treble the amount of the award.

[As to what is unlawful detainer, see note in 120 Am. St. Rep. 32. As to right to civil action for forcible entry and detainer, see note in 121 Am. St. Rep. 369.]

Appeals from District Court, Silver Bow County; Michael Donlan, Judge.

ACTION by the Centennial Brewing Company against O. Rouleau and Louis Tetreault. From a judgment for plaintiff and from an order denying their motion for a new trial in cause No. 3,409, defendants appeal. In cause No. 3,503, plaintiff appeals from the judgment. Judgment reversed and cause remanded for a new trial.

(Cause No. 3,409.)

Mr. John Lindsay, Messrs. Canning & Geagan and *Mr. Henry C. Smith,* for Appellants, submitted a brief; *Mr. Smith* argued the cause orally.

Section 7271, Revised Codes, is highly penal, and must be strictly construed. One does not become guilty of an unlawful detainer until demand is made and he refuses to surrender possession. (*Finley* v. *Magill,* 57 Mo. App. 481; 19 Cyc. 1147.) "It is of the essence of an unlawful detainer that possession is refused on demand in writing." (*Spear* v. *Lomax,* 42 Ala. 576.) "In an action for unlawful detainer under the statute, the plaintiff must aver and prove a demand in writing for the possession of the premises which he seeks to recover." (*Doss* v. *Craig,* 1 Colo. 177.) Under it, it is necessary that the complaint allege that the plaintiff is entitled to possession at the time of the commencement of the action, in set terms (*Kennedy* v. *Dickie,* 27 Mont. 70, 69 Pac. 672), or it must state facts which show such right of possession. (*Bryan* v. *Smith,* 10 Mich. 229.)

A demand of possession must be made by the landlord before bringing suit against his tenant for holding over. Such demand is indispensable, and is as necessary to be made before suit as that the relation of landlord and tenant should exist. (*Paul* v. *Armstrong,* 1 Nev. 82.)

It is our contention that section 7271 involves something more than a mere failure to be right with regard to a pending controversy, as, for instance, an honest dispute as to the terms of a lease. "Where a party brings an action for the possession of property which he claims is being unlawfully detained from him, he must allege and prove not only that he has the right of, and is entitled to, its possession, but also that such property is being unlawfully detained from him after notice to quit is served as provided by law." (*Barnes* v. *Cox*, 12 Utah, 47, 41 Pac. 557.)

The notice in this case was of the termination of a lease under which, admittedly, the appellants were not holding. Nevertheless, appellants continued in possession and to pay rent for the premises; and no action having been taken to dispossess them until the commencement of this suit, it must be concluded that they were holding with the consent of the landlord. Where a lease has expired by its own limitations, the lessee holding over may become a tenant at will, providing such holding was with the assent of the landlord. (24 Cyc. 1040.) Under a verbal lease for more than a year, the entering lessee becomes a tenant at will. (32 Cent. Dig. (Landlord and Tenant), sec. 409.) A tenant in possession under a parol lease for two years, which is void by the statute of frauds, is a tenant at will or from year to year. (*Duke* v. *Harper*, 14 Tenn. 280, 27 Am. Dec. 462; *Talamo* v. *Spitzmiller*, 120 N. Y. 37, 17 Am. St. Rep. 607, 8 L. R. A. 221, 36 N. E. 980; *Dumn* v. *Rothermel*, 112 Pa. 272, 3 Atl. 800.) A tenant's possession, after the termination of a lease under an oral agreement for a new lease and the making of improvements, are sufficient notice of his rights as against one who has received a written lease of the premises, but who has paid no rent and expended no money under his lease. (*Morrison* v. *Herrick*, 130 Ill. 631, 22 N. E. 537.)

The verdict is defective. It should have found, in form and substance, that the appellants were guilty of "unlawful detainer" of the premises. (*Spellman* v. *Rhode*, 33 Mont. 21-27. 81 Pac. 395.) "A verdict must always be responsive to, and

find upon, every issue necessary to recovery, and must support the judgment." (*McCleary* v. *Crowley*, 22 Mont. 245, 56 Pac. 227.) The gravamen of the action is the unlawful detainer, without the existence of which the defendant must prevail. The verdict does not declare that the plaintiff was ever entitled to possession. (*McCleary* v. *Crowley, supra.*)

Messrs. Chas. R. Leonard and *Frank C. Walker*, for Respondent, submitted a brief; *Mr. Walker* argued the cause orally.

Appellants raise the point that plaintiff's complaint is defective, for the reason that there is no allegation appearing in said complaint that plaintiff ever demanded possession of the premises. In support of this counsel for appellant cite several authorities, none of which are at all in point. They have cited the case of *Doss* v. *Craig*, 1 Colo. 177. The court there said: "In order to maintain a suit under the Act, it is absolutely and essentially necessary that the plaintiff shall first have made a demand in writing for the delivery of the premises in question. This being the law, it was the duty of the plaintiff, if such demand was made, to set it out in his petition as a substantial fact, as required in section 11 of the Act." From a reading of this decision, it is apparent that the Colorado statute demands specifically that a written notice be served upon the party, and that a demand be made. Not only that, but it will be seen further in the decision that the written notice must be left with the party, or there is no demand. No such provision appears in our statute, and by no rule of law can it be read into the statute when it does not appear there. Counsel also cite *Finley* v. *Magill*, 57 Mo. App. 481. A perusal of this case will show that the Missouri statute is different from the Montana statute, and therefore the case is not in point. The case of *Spear* v. *Lomax*, 42 Ala. 576, is not in point for the same reason. Counsel cite the case of *Paul* v. *Armstrong*, 1 Nev. 82. This case, however, comes within a provision similar to subdivision 2 of section 7271 of our Code, and applies only when the party fails to pay rent when due. Our statute says that upon failure to pay rent,

written notice of three days is necessary. As we have said before, however, subdivision 1 of the same section makes no such provision. Counsel also cite the case of *McCleary* v. *Crowley*, 22 Mont. 245, 56 Pac. 227. This is a case of forcible detainer, and our statute upon forcible detainer, like subdivision 1 of the unlawful detainer statute, requires no notice and no demand. The court in the *McCleary Case* says that the case was based upon subdivision 1 of section 2081, and that a demand is not necessary. If the forcible detainer statute is silent as to notice and demand, therefore as the court says that none be required, why should notice and demand be required under the unlawful detainer statute, this statute also being silent as to demand and notice?

The next question raised by appellants is that the verdict is defective, in that it is not responsive to and does not find upon every issue necessary to recover. In support of their contention they cite two Montana cases, both of which cases hold squarely against the principle which counsel hold they stand as authority for. The case of *Spellman* v. *Rhode*, 33 Mont. 21, 81 Pac. 395, holds that a general verdict finding for plaintiff is sufficient. *McCleary* v. *Crowley*, *supra*, decides the same principle of law, and says that a general verdict is sufficient. In the case at bar, the verdict found for the plaintiff and against the defendant, and if there was nothing further in the verdict, that alone would be sufficient. However, the verdict does find that the defendants held without right. That "without right" means unlawfully, we submit to be so clear that we shall cite no authority to support it.

(Cause No. 3,503.)

Messrs. Chas. R. Leonard, Frank C. Walker and *Earle E. Genzberger*, for Appellant, submitted a brief; *Messrs. Walker* and *Genzberger* argued the cause orally.

Under a statute of California identical with our section 7283, Revised Codes, which was construed in the case of *Tewksbury* v. *O'Connell*, 25 Cal. 262, it was held that if a complaint in an

action arising under the statute concerning forcible entry and detainer contains proper averments of damages sustained, and plaintiff recovers, the damages are to be assessed by the jury, or by the court acting without a jury, according to the facts of the case, and may include the rents and profits, and when this is done, it is made the duty of the court to treble such damages. (See, also, *Missoula Electric Co.* v. *Morgan,* 13 Mont. 394, 34 Pac. 488; *Rimer* v. *Blasingame,* 94 Cal. 139, 29 Pac. 857; *Eccles* v. *Union Pacific Coal Co.,* 15 Utah, 14, 48 Pac. 148.) Other jurisdictions construing similar statutes have held it imperative that double and treble damages be awarded by the court in actions for unlawful detainer, where the court or jury found in favor of the plaintiff and assessed the damages. The Missouri court of appeals, under a Missouri statute requiring the court in actions for unlawful detainer to give judgment for restitution of the premises and double the sum assessed as damages, held that it is imperative upon the court to double the damages assessed on a finding for the plaintiff, even though not specifically prayed for in the complaint. (*Bierkenkamp* v. *Bierkenkamp,* 88 Mo. App. 445; *Hadley* v. *Bernero,* 97 Mo. App. 314, 71 S. W. 451.) The supreme court of Washington has repeatedly held that damages assessed by the jury must be double in actions of this character. (*Decker* v. *Verloop,* 73 Wash. 10, 131 Pac. 190; *Hinckley* v. *Casey,* 45 Wash. 430, 88 Pac. 753; *Hart* v. *Pratt,* 19 Wash. 560, 53 Pac. 711; *Bond* v. *Chapman,* 34 Wash. 606, 76 Pac. 97.) Among other courts taking this view are those of Michigan and Oklahoma. (*Hitchcock* v. *Pratt,* 51 Mich. 263, 16 N. W. 639; *Chisholm* v. *Weise,* 5 Okl. 217, 47 Pac. 1086.)

Mr. John Lindsay, for Respondents, submitted a brief; *Mr. Henry C. Smith,* of Counsel, argued the cause orally.

The hiring of the premises by Rouleau constituted a lease for one year from on or about March, 1912, so that the second lease to the Centennial Brewing Company was a nullity so far as Rouleau and Tetreault were concerned. Section 5228, Revised Codes, reads as follows: "A hiring of real property, other than lodgings and dwelling-houses, in places where there is no usage

on the subject, is presumed to be for one year from its commencement, unless otherwise expressed in the hiring." (*Brill* v. *Carsley*, 2 Cal. App. 331, 84 Pac. 57.) And the notice of November 29, 1912, was of no effect, because the statement therein contained, "Your hiring will cease and terminate on December 31, 1912," was unwarranted; and this action was begun before the Rouleau and Tetreault lease had expired. There is not anything in the record to warrant the conclusion that respondents' lease terminated on December 31, 1912; and there can be no presumption that it was a lease from month to month, because Lavell's own testimony dispels such presumption and shows that it was "a hiring without definite terms," to quote the language of the court in *Brill* v. *Carsley, supra.*

No damages were proven and no rent was due; consequently there was not anything to treble under section 7283, Revised Codes. The statute expressly declares that the damages must be "alleged in the complaint and proved on the trial."

The complaint does not state a cause of action. It fails entirely to allege, either directly or indirectly, that plaintiff is entitled to the possession of the premises. (*Kennedy* v. *Dickie*, 27 Mont. 70, 77, 69 Pac. 672.)

The relation of landlord and tenant must exist before this action can be maintained. (24 Cyc. 1407, 1418, 1421; *Lantry* v. *Wallace*, 97 Fed. 865, 38 C. C. A. 510; *Pico* v. *Cuyas*, 48 Cal. 639; *Mason* v. *Delancy*, 44 Ark. 444; *Taylor* v. *Monohan*, 71 Ky. 238; *Smith* v. *Killeck*, 10 Ill. 293; *Gics* v. *Storz Brewing Co.*, 75 Neb. 698, 106 N. W. 775; *Colorado etc. Building Assn.* v. *Harvey*, 23 Ky. Law Rep. 1009, 64 S. W. 676; *Marvel* v. *Redman*, 2 Ind. 268; *Hunter* v. *Maanum*, 78 Wis. 656, 48 N. W. 51; *Gulledge* v. *White*, 73 Tex. 498, 11 S. W. 527.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by the plaintiff for an alleged unlawful detainer by the defendants of a building in the city of Butte, described as No. 117 East Park Street, and for damages for its detention.

The complaint alleges that on the —— day of December, 1912, Geoffrey Lavell, the owner thereof, leased the building to the plaintiff for a term of one year, beginning on January 1, 1913, and ending December 31, 1913, at a rental of $1,200 for the term, payable monthly in installments of $100 per month; that in December, 1911, Lavell had leased the premises to one George Charpentier for a term beginning on January 1, 1912, and ending on December 31, 1912; that Charpentier held possession under this lease until February, 1912; that he then sold the saloon business conducted by him in the building and assigned the lease to the defendant Rouleau, who, together with the defendant Tetreault, thereafter held possession of the premises and paid the stipulated rental to Lavell; that on November 29 and 30 he caused to be served upon the defendants Rouleau and Tetreault the following notice in writing: "You and each of you are hereby notified by Geoffrey Lavell, the undersigned and the owner of those certain premises now occupied by you and used in the conduct of a saloon therein and designated and numbered 117 East Park Street, Butte, Montana, that he has granted a lease on said premises to the Centennial Brewing Company, a corporation, for the term of one year, with the privilege of two years, commencing on January 1, 1913, and the undersigned therefore hereby notifies you that your hiring of said premises will cease and terminate on December 31, 1912, and that commencing with January 1, 1913, the said Centennial Brewing Company will be entitled to enter into possession thereof under the lease aforesaid, as to all of which you will take due and timely notice and act accordingly"; "that notwithstanding the termination of the said Charpentier lease on December 31, 1912, under and by virtue of which the defendants held possession of said premises, they still continue in possession thereof, and have refused and still refuse, to recognize the right of plaintiff to possession thereof, and during all of the time since the commencement of the plaintiff's lease have failed and refused to surrender possession of said premises to the plaintiff, by reason whereof the plaintiff has been damaged

in the sum of three hundred ($300) dollars, and that the plaintiff will continue to suffer damage in the sum of $100 per month for each and every month that the said defendants continue in possession of said premises."

Their general demurrer having been overruled, the defendants filed their answer which, while admitting that they were in the possession of the premises and that Lavell had served upon them the notice set out in the complaint, by denials and counter-averments joined issue upon all the other allegations of the complaint. They further averred that they had been in possession of the property since April 1, 1912, paying the rent therefor, and that they had not been notified to surrender possession to anyone. This averment was denied by reply. At the trial, the court having denied defendants' motions for a nonsuit and a directed verdict, directed a verdict for the plaintiff. The verdict assessed the damages at $400. Counsel for the plaintiff requested the court to direct judgment for treble the amount of the award. This the court refused to do and ordered judgment for restitution of the premises and the amount found by the jury. The defendants have appealed from the judgment and order denying their motion for a new trial. The plaintiff has appealed from the judgment.

The overruling of the demurrer is assigned as error. Defend-
[1] ants contend that the complaint is insufficient (1) in that it is not alleged therein that the plaintiff was entitled to the possession of the premises at the time of the commencement of the action, and (2) in that it is not alleged that plaintiff demanded possession of the defendants before bringing the action. The action was brought under section 7271 of the Revised Codes, which so far as is pertinent here, declares: "A tenant of real property or mining claim for a term less than life, is guilty of unlawful detainer: 1. When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of the landlord, or the successor in estate of his landlord, if any there be, but in case of a tenancy

at will, it must first be terminated by notice, as prescribed in the Civil Code." The provisions of the Codes of which this section is a part (sections 7269–7288) deal with the subject of summary proceedings to obtain possession of real property. They specifically authorize actions for forcible entries and detainers, and unlawful detainers, and define the circumstances under which each one lies. The circumstances under which the former two actions may be maintained, and the allegations of fact necessary to be made, are discussed somewhat at length in *Kennedy* v. *Dickie,* 27 Mont. 70, 69 Pac. 672, and *Spellman* v. *Rhode,* 33 Mont. 21, 81 Pac. 395. What is said in these cases has no pertinency here, because section 7271 deals wholly with the relation of landlord and tenant. The allegations necessary to sustain an action in either of the former cases being inappropriate to sustain the latter, we must look exclusively to the latter to ascertain what the plaintiff must allege. Upon an analysis of this section we find it is necessary for it to appear (1) that the plaintiff is the landlord, or his successor in estate; (2) that the defendant became possessed of the property by virtue of a lease for a term less than for life; (3) that he has continued his possession, in person or by subtenant, after the expiration of the term specified in the lease without permission of the plaintiff or his successor; and (4) if the tenancy is at will, that it has been terminated by notice as prescribed by section 4502 of the Revised Codes. Nowhere in the section, nor in section 7276, which prescribes what must be set forth in the complaint, is there any requirement that plaintiff allege ownership or right to the possession, or that demand has been made for delivery of possession. In contemplation of law, the right to the possession is a necessary inference from the allegations showing the relation of landlord and tenant, and the expiration of the term of the lease under the stipulation in the contract fixing the time of its duration. So, too, the right of the land-
[2] lord to be restored to possession is complete at the expiration of the term, whether the contract of lease specifically so stipulates or not; for the expiration of the term

is notice to the lessee that his right to occupy the property has ceased, and the duty arises at once to restore the possession to his landlord, without demand or notice. Subdivisions 2, 3 and 4 of the section define the rights of the parties under the circumstances stated in them, and impose upon the landlord the duty to give notice and make demand as therein indicated; but these provisions have no relation to the rights and obligations of the parties as they exist under the circumstances covered by the provisions of subdivision 1. Under this subdivision the giving of notice of any kind or the making of a demand is not required as a condition precedent to the bringing of the action. To read the requirements of any of these subdivisions into subdivision 1, would be to add to the definition of unlawful detainer therein laid down elements which the legislature thought it not necessary to include. This we are not required to do.

Counsel cite several cases in support of their contention; but the provisions of the local statutes under which they arose are substantially different from ours in the requirement made by them. *Spear* v. *Lomax*, 42 Ala. 576, and *Bryan* v. *Smith*, 10 Mich. 228, are illustrative examples. For these reasons, and so far as the objections made to it avail, we think the complaint sufficient to meet the requirements of the statute.

There is another feature of it, however, to which we venture to call the attention of counsel, though they have not referred to it in their brief, *viz.*, the absence of a specific allegation that [3] the holding over by the defendants was without the permission of plaintiff. A holding over without the permission of the landlord is an essential element of the wrong defined and denounced by the statute; hence we think that to state a cause of action, the complaint should allege specifically the character of the holding, or state facts sufficient to furnish a clear inference that it is contrary to the landlord's wishes or unlawful. The character of the defendants' possession in this case is inferable—if at all—from the allegation in the latter part of the complaint that "since the commencement of the plaintiff's lease, defend-

ants have failed and refused to surrender possession of said premises." Whether this allegation renders the complaint sufficient to withstand attack by general demurrer is, to say the least, doubtful. We refer to this feature of it in order to avoid the implication that we deem direct allegations on this subject unnecessary.

The next contention is that the court erred in withdrawing the case from the consideration of the jury. The evidence introduced by the plaintiff is exceedingly vague, indefinite and contradictory—so much so as to leave it uncertain whether the defendants entered into possession under the Charpentier lease or under an arrangement with Lavell, the exact nature of which is not disclosed. For the purpose of defendants' appeals, counsel have conceded that it was sufficient to make out a case for the jury. Charpentier's lease was oral, but by its terms he was to occupy the premises for a term covering the year intervening between January 1 and December 31, 1912, for a rental of $1,200, payable in installments of $100 per month on the first of each month, in advance. He paid the installments for January and February. During the month of February, Lavell found the defendants in possession, and, after some demur, accepted the rent from them, and they continued in possession. Exactly when the formal lease to the plaintiff was executed does not appear, but for present purposes it may be assumed to have been executed prior to the date of the notice set out in the complaint. If plaintiff's claim that defendants were holding under the Charpentier lease is well founded, it is only important that it does appear that plaintiff became the successor in estate to Lavell pending the term covered by it, and thus became entitled to the possession of the property at the expiration of its term. As a precautionary step to indicate to defendants that the plaintiff had been substituted as his successor, the notice by Lavell was proper. The defendants were not entitled to it, however; for, as already pointed out, it became their duty to vacate the premises upon the expiration of their term, without regard to whether Lavell was still the owner. Nothing else appearing,

the plaintiff's right to a verdict was established. The evidence introduced by the defendants, however, directly controverts plaintiff's claim and tends strongly to show that the defendants went into possession under a specific agreement with Lavell, by which he leased the building to them for two years, from April 1, 1912, to March 31, 1914, and that, relying upon this contract, they purchased Charpentier's business, which they would not have done in the absence of such agreement, because they did not care to embark in the business for the remainder of the term covered by his lease. Rouleau testified that Charpentier made an offer to sell the business to him in March, 1912; that upon ascertaining from him that the lease would expire at the end of the year, he declined to purchase it; that it was then suggested by Charpentier that Rouleau see Lavell and ascertain what prospect there was for obtaining a lease for a longer term; that he saw Lavell and having informed him that Charpentier was about to sell the business and that he (Rouleau) and his co-defendant Tetreault were willing to buy it, if they could secure a suitable lease, it was thereupon agreed by Lavell that they should have a lease for a term of two years, from April 1, 1912, for the same rental paid by Charpentier, with the privilege of a renewal for a term of three years more; that defendants thereupon made the purchase and entered into possession, thereafter making substantial repairs and permanent improvements upon the building; that though the written lease was prepared and submitted to the defendants for approval and was approved by them, Lavell failed to execute and deliver it; and that the repairs and improvements to be installed by the defendants were discussed at the time the oral contract was made, and the necessity for them, in order to conduct the business in the building, was the reason why a lease for a longer term than that under which Charpentier held was desired and granted. He related further that the rent was promptly paid; that at first Lavell declined to receive it but subsequently did so until January, 1913; that at that time an oral demand was made upon the defendants by the agent of plaintiff; that they refused to pay

the rent to it or to recognize it as their landlord; that they claimed to hold under their lease from Lavell, and were basing their right to continue in possession at the time the action was brought upon their contract with him; that after that date, upon refusal by Lavell to accept the installments of rent, defendants deposited them for the months of January and February in the Silver Bow National Bank to his credit; that subsequent installments were paid by them to the First National Bank on his account; and that Lavell stated as his reason for not executing the written lease at once that he had to leave the city but would return in a few days and attend to it. He stated further that within a few days thereafter Lavell came into the place bringing a written lease expressing the terms which they had theretofore agreed upon, and left it; that he then said that, as the day was Sunday (which was the case) and the contract would not be valid if executed on that day, he would return and sign it on the following day; and that, returning on the following day and asking for the lease in order that he might sign it, he took it away and did not thereafter return it. It is suggested by some circumstances disclosed in the evidence, that the real reason why Lavell finally concluded not to execute the lease was that he had ascertained that the defendants were unwilling to keep for sale the beer manufactured by the plaintiff. This witness is corroborated in material respects by other witnesses; but even without this corroborating evidence there was presented an issue of fact calling for a finding by the jury. For if the defendants were not holding under an assignment of the Charpentier lease as alleged in the complaint, but under the unexecuted lease, this fact was a complete defense to the unlawful detainer charged. Upon the assumption that their lease was void because not evidenced by a writing (Rev. Codes, sec. 5017), they had entered under it by permission of Lavell, and the court was not justified in concluding that they had entered under the Charpentier lease.

Other considerations aside, upon the assumption that the **[4]** oral lease was wholly void, we think that in correct theory the defendants became Lavell's tenants at will. (Tiffany on

Landlord and Tenant, 106; Taylor's Landlord and Tenant, sec. 59; *Goodwin* v. *Clover,* 91 Minn. 438, 103 Am. St. Rep. 517, 98 N. W. 322; *Nickolls* v. *Barnes,* 32 Neb. 195, 49 N. W. 342; *McIntosh* v. *Hodges,* 110 Mich. 319, 68 N. W. 158, 70 N. W. 550; *Talamo* v. *Spitzmiller,* 120 N. Y. 37, 17 Am. St. Rep. 607, 8 L. R. A. 221, 23 N. E. 980.) Upon this theory, the tenancy would have been terminated by the giving of the notice prescribed in section 4502, *supra;* otherwise by express provision of section 4503 the action could not be maintained. As Lavell's successor, the plaintiff had no other or greater rights than he had. (Rev. Codes, sec. 4521.)

A question suggested by the facts appearing in the record [5] but not referred to in the briefs, is worth consideration, *viz.,* whether in view of the purchase by the defendants of the Charpentier business, their entry into possession and the installation of the repairs and improvements had in contemplation at the time, all of which acts were done upon the assumption that defendants were to have the lease, coupled with the knowledge of Lavell that they were acting upon this assumption, the agreement did not become binding upon Lavell for all purposes as fully as if the lease had been fully executed. We shall not stop to consider this feature of the case, but submit the question to counsel for such consideration as they may deem proper to give it.

It remains to inquire whether the notice set out in the [6] complaint was sufficient to terminate the tenancy of the defendants. It will be observed that it does not upon its face purport to have been authorized by the plaintiff; but, passing this, after stating the fact that the property had been leased to the plaintiff for a term beginning on the first of the following year, it conveyed notice that after that time the plaintiff would be entitled to possession, and that defendants must act accordingly. In legal effect, it amounted simply to notice that the plaintiff would become the landlord of defendants at the beginning of the year, and that they should shape their conduct in view of that fact. The statute (sec. 4502, *supra*) requires the landlord to give notice to the tenant "to remove from the prem-

ises'' within a term specified, not less than one month. The writing was not a compliance with this requirement in either particular. That it was understood to have the purport we have given it is made entirely clear by the fact, which appears from the testimony, that on the first day of January following, the agent of the plaintiff went to the defendants and demanded orally that they pay the rent to the plaintiff or vacate the premises. The court should have submitted the case to the jury under proper instructions.

A third contention made by the defendants is, that the verdict is insufficient in form. In view of what has already been said it will not be necessary to notice this contention.

The appeal of the plaintiff presents the single question [7] whether the court erred in refusing to order judgment for treble damages. Since the case must be tried again, we shall not consider the question presented, further than to say that the provision of the statute (Rev. Codes, sec. 7283) is explicit: ''The jury, or the court if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant, guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due.'' Therefore, in such cases, the court has no discretion, but must follow the mandate of the legislature here laid down. If the unlawful detainer is proven and damages are awarded, a judgment for treble the amount of the award follows as a matter of course.

The judgment and order are reversed and a new trial is ordered.

Reversed and remanded.

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY, being absent, takes no part in the foregoing decision.

DEAN ET AL., RESPONDENTS, v. STEWART ET AL., APPELLANTS.

(No. 3,407.)

(Submitted September 15, 1914. Decided October 20, 1914.)

[143 Pac. 966.]

Mechanics' Liens — Railroads — Notice of Lien—Sufficiency — Equity—Findings—Conclusiveness.

Equity—Findings—Conclusiveness.

1. The findings in an equity case, whether the result of a trial by the court or a referee, based upon substantially conflicting evidence, will be sustained on appeal unless the evidence preponderates against them.

[As to weight in appellate court of findings of judge as to amount of damages as compared with verdict of jury, see note in Ann. Cas. 1913C, 178.]

Mechanics' Liens—Railroads—Notice of Lien—Sufficiency.

2. Where, from a notice of lien for materials and labor furnished in the construction of a railway roadbed, it could be ascertained that the property sought to be charged with a lien was a particular portion of the roadbed in a certain county belonging to the therein named railway company, and located "on miles 46 and 47 of the survey" of said railway company, near a given place, the notice was sufficiently specific to meet the requirements of section 7291, Revised Codes.

[As to the application of mechanic's lien laws to railroads, see note in Ann. Cas. 1913C, 95.]

Same—Lien on Roadbed—Extent of Lien.

3. Since a mechanic's lien is primarily given upon the structure in the erection of which work was done and material furnished, it cannot be affected by a misdescription of the land upon which it stands, if the structure itself can be identified; hence a lien on a portion of a railroad roadbed, located outside a city or town, susceptible of identification, was not defeated merely because in the notice of lien the description of the roadbed covered more than one acre (Rev. Codes, sec. 7293).

[As to buildings and other property subject to mechanics' liens, see note in 78 Am. Dec. 694.]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by Guy Dean and E. T. Elrod, copartners, against John Stewart and Patrick Welch, copartners, and the Chicago, Milwaukee & St. Paul Ry. Company of Montana. From a judgment in favor of plaintiffs, defendants appeal. Modified and affirmed.

Mr. Henry C. Stiff and *Mr. William L. Murphy*, for Appellants Dean and Elrod, submitted a brief and argued the cause orally.

Messrs. H. H. Field, F. M. Dudley and *Henry C. Stiff*, for Appellant Railway Company, submitted a brief; *Mr. Stiff* argued the cause orally.

Appellant railway company contends that there has not been even a substantial compliance with that provision of the Code (sec. 7291) relating to a description of the property sought to be charged, and that therefore no lien was ever created upon its property, the description being too indefinite and uncertain to constitute a compliance with the statute. This contention is supported by decisions of the supreme court of Missouri in the following cases: *Matlack* v. *Lare*, 32 Mo. 262; *Williams* v. *Porter*, 51 Mo. 441; *Wright* v. *Beardsley*, 69 Mo. 548; *Ransom* v. *Sheehan*, 78 Mo. 668. Furthermore, the area of the piece or parcel would be something more than fifteen acres, and as already indicated, appellants' contention is, in view of the provisions of section 7293, Revised Codes, that a lien cannot extend to any greater area than one acre, if outside of any town or city. The language of the statute referred to is so plain that it does not seem there could be any question as to the limitation of a lien to one acre. This view, we think, is sustained by the language of this court in the case of *Smith* v. *Williams*, 2 Mont. 195, as well as that in *Smith* v. *Iron Mountain Tunnel Co.*, 46 Mont. 13, Ann. Cas. 1914B, 551, 125 Pac. 649. It may be suggested that the defect just pointed out may be remedied by a modification of the decree, limiting the area to be affected by the lien to one acre. This, however, we insist cannot be done in view of the doctrine announced by this court in the case of *Yerrick* v. *Higgins*, 22 Mont. 502, 57 Pac. 95. That was a case where a party seeking to avail himself of the homestead exemption law by filing the declaration provided for by statute, embraced by the description of the property a slightly greater area than was permissible under the law, and it was held that

the declaration was void as to the whole of the property claimed as exempt, notwithstanding an exemption thereof could have been effected had the property described and claimed not been of greater area than the law authorized. It may be suggested that the foregoing contention, so far as the matter of area is concerned, is not in accord with the decisions in the following cases: *Cox* v. *Western Pac. R. R. Co.*, 44 Cal. 18; *Williams* v. *Mountaineer Gold Min. Co.*, 102 Cal. 134, 34 Pac. 702, 36 Pac. 388; *Farmers' Loan & Trust Co.* v. *Candler*, 87 Ga. 241, 13 S. E. 560; *Midland Ry. Co.* v. *Wilcox*, 122 Ind. 84, 23 N. E. 506; *Park City Meat Co.* v. *Comstock Silver Min. Co.*, 36 Utah, 145, 103 Pac. 254. These decisions, or at least some of them, hold that the right of lien extends to the whole of the "structure" upon which the work and labor was performed, or for which materials were furnished, and that a claim of lien upon any portion of the "structure" less than the whole thereof is void. They do not disclose what limitations, if any, as to area were provided by statute in the states in which such decisions were rendered, and we have been unable from any other source to ascertain what, if any, limitations were there prescribed. But if these decisions are to be considered as at all controlling, we insist nevertheless that the so-called lien in this case is void, as the notice or claim of lien filed by respondents does not pretend to extend to or affect any part of the "structure" (the roadbed of this appellant) other than "a certain piece of roadbed of the Chicago, Milwaukee and St. Paul Railway Company of Montana," *etc.*

Messrs. Hall & Whitlock, for Respondents, submitted a brief; *Mr. A. N. Whitlock* argued the cause orally.

It is contended by the appellants that the lien is invalid for the reason that it does not properly describe the property sought to be charged. They rely upon four Missouri cases, but it will be seen upon an examination of those cases that they do not support the propositions for which they were cited.

The case of *Mattlack* v. *Lare* was an attempt to describe certain buildings, and it simply described them as located on a

certain street between two other streets. In the case of *Williams* v. *Porter* the only description of the land was a description of the subdivision according to the government survey, a description including forty acres. In the case of *Wright* v. *Beardsley* there was simply a statement that the house was situated "near the northeast corner of the northeast quarter of the southwest quarter of section 9, *etc.*" While in the case of *Ransom* v. *Sheehan* a description of fifteen acres of ground was held not sufficient to identify a certain building standing on the fifteen acres. It is to be noted that neither one of these cases was a railroad case, and it is to be noted further that in this case in the notice of lien there is a definite designation of the line of railroad extending over two miles, which is easily identified from the plat to which reference is made, and in the decree the lien is limited to the line of railway included between certain definite stations which are also easily identified. It has been held even in Missouri that the description of more land than the amount upon which the party is allowed a lien is fatal (see *Oster* v. *Rabeneau,* 46 Mo. 595; *Bradish* v. *James,* 83 Mo. 313), the case last cited being later than any of the cases cited by appellants. The cases are legion in other jurisdictions where the property sought to be charged is not a railroad, to the effect that a description of more property than the amount upon which the lien is allowed is not fatal. (See *North Star Iron Works* v. *Strong,* 33 Minn. 1, 21 N. W. 740.) And it is to be noted that in that state the statute is similar to our own. (*Evans* v. *Sanford,* 65 Minn. 274, 68 N. W. 21; *White Lake Lumber Co.* v. *Russell,* 22 Neb. 126, 3 Am. St. Rep. 262, 34 N. W. 104; *Whitenack* v. *Noe,* 11 N. J. Eq. 321; *Halsey* v. *Waukesha etc. Sanatarium,* 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94.) For other cases holding that an inaccuracy in the description is not fatal, see *Willamette etc. Co.* v. *Kremer,* 94 Cal. 205, 29 Pac. 633; *McHugh* v. *Slack,* 11 Wash. 370, 39 Pac. 674; *Howe* v. *Smith,* 6 N. D. 432, 71 N. W. 552; *Doyle* v. *Wagner,* 100 Minn. 380, 111 N. W. 275. With reference to railroads, the same consideration would apply so far as the accuracy of the de-

scription is concerned, but we desire to state frankly that there is a considerable conflict in the cases as to whether a lien upon a railway should be upon the entire road, the portion of the road in the state, or upon that portion of the railroad upon which the work was done. Appellants have cited some cases which seem to hold that the lien should be upon the whole road. Yet upon close examination of those cases it cannot be said that they are contrary to the position taken by us in this case. We desire to call the court's attention to two cases which we consider in point upon this very matter: *Adams* v. *Grand Island etc. R. Co.*, 12 S. D. 424, 81 N. W. 960, and *Ban* v. *Columbia etc. Ry. Co.*, 117 Fed. 21, 54 C. C. A. 407.

MR. JUSTICE SANNER delivered the opinion of the court.

The plaintiffs brought this action in the district court of Missoula county to recover from the defendants, Stewart & Welch, a balance of $51,205.85, alleged to be due for labor and materials furnished in the construction of the railway and roadbed of the defendant Chicago, Milwaukee & St. Paul Railway Company of Montana, during the years 1907 and 1908, and to foreclose a lien upon said property. The material issues of fact were the amount and value of the work done and whether the work was done under contract between the plaintiffs and Stewart & Welch, who were contractors under Winston Brothers, whose contract in turn was with the company. The issues were referred to Daniel J. Heyfron, Esq., an attorney and counselor at law of Missoula, Montana, who was directed to take the proof and report the same, together with his findings of fact and conclusions of law, to the district court. The referee proceeded, and as the result of the evidence presented to him, found, in substance, that Stewart & Welch did contract with the plaintiffs for the construction of the portion of the railway in question, agreeing to pay therefor as follows: 32½ cents per cubic yard for moving common earth, 90 cents per cubic yard for solid rock, 1 cent per cubic yard for overhaul, and $1.25 per square rod for grubbing; that the plaintiffs moved 90,751 cubic

yards of common earth, 24,870 cubic yards of solid rock, 664,400 cubic yards of overhaul, and did 58 square rods of grubbing; that at the special instance of Stewart & Welch and the railway company, plaintiffs also did extra work in reconstructing a culvert of the reasonable value of $250; that in consequence of such operations plaintiffs became entitled to receive the sum of $58,843.57 and have received $48,843.95, leaving still due to them $9,999.62; that the work was completed on November 10, 1908, and on December 16, 1908, plaintiffs filed their notice and claim of lien. As conclusions of law the referee reported that plaintiffs were entitled to judgment against the defendants Stewart & Welch for $9,999.62, with interest at eight per cent from December 18, 1908, and to a first lien upon 3,300 feet of said railroad lying between stations 1600 and 1633, in miles 46 and 47 near Rivulet, Missoula county, Montana.

This report of the referee, together with the evidence presented at the hearing before him, was submitted to the district court, upon plaintiffs' motion for a judgment and decree accordingly, and upon defendants' exceptions to the report, motion to reject the findings and to adopt certain other findings contrary thereto. The court overruled the motion to reject and adopted the findings, save as to an item of attorneys' fees. On May 21, 1912, a judgment and decree was entered for the plaintiffs as of December 30, 1911, in accordance with the findings as adopted. From that judgment and decree Stewart & Welch and the railway company have appealed.

Much discussion is devoted to the proposition that this court ought not to consider the voluminous record of the evidence, for certain reasons of procedure. We shall put them aside, because we prefer to dispose of the case upon the merits.

The questions then are: (1) Is the evidence sufficient to sustain (a) the finding of a contract between the plaintiffs and Stewart & Welch, and (b) the finding as to the amount of work done? (2) Is the notice of lien sufficient?

1. We shall assume without deciding, that this case—even as to Stewart & Welch—is in equity, and that the conclusions below

[1] may be reversed if the evidence decidedly preponderates against them; but in determining whether the evidence does preponderate against the findings, we are not to forget that the trial court (in this case the referee) had the advantage of the personal presence of the witnesses, and "owing to this advantageous position this court will naturally hesitate to overturn findings based upon substantially conflicting evidence which would justify an inference in favor of either side." (*Bordeaux* v. *Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Boyd* v. *Huffine*, 44 Mont. 306, 120 Pac. 228.) (a) The contention on the part of defendants was that plaintiffs were not in contractual privity with Stewart & Welch but with one John Hanson, a contractor under Stewart & Welch. Let it be granted that there is ample evidence to justify this conclusion; what is to be said against it? The plaintiff Dean testified that there had been negotiations between his firm and Hanson for the work at a certain price; these negotiations terminated without result; thereafter he saw Mr. Shepard, who is admitted to have been the superintendent and authorized agent of Stewart & Welch, and who sought to have plaintiffs do the work; he was told by Dean that they would take the work from Stewart & Welch but would have nothing to do with Mr. Hanson. Shepard told them to go ahead and a price was agreed upon. During the work plaintiffs took their instructions from Stewart & Welch. Mr. Elrod, the other plaintiff, testified to similar effect. Mr. Shepard testified for the defendants, that as superintendent for Stewart & Welch he had written to and discussed with the plaintiffs the matter of their doing the work, but that he did so and actually procured the plaintiffs to do the work for Hanson, as it was within the range of Hanson's contract. Certain letters, however, which were received in evidence, tend to support the plaintiffs rather than Mr. Shepard in this regard. Prior to September 23, 1907, plaintiffs had signified to Hanson their willingness to accept a contract from him, and on that date he wrote to them that certain changes in the work directed by the engineers of the company precluded the successful use of a team outfit, "so we will have

to call the deal off." On September 25, plaintiffs wrote Mr. Shepard inclosing Hanson's letter of September 23, adding: "Will consider your letter a guaranty and will continue to make our arrangements to move over and take the work." In response plaintiffs received a letter signed "Stewart & Welch—J. C. Shepard," stating: "You can have the cut and at prices named, and as I said before, I will see you get a square deal." Plaintiffs answered: "Would like to have you make Hanson come through with a contract for the work after what has transpired"; and the rejoinder, signed "J. C. Shepard for Stewart & Welch," says: "It is not customary to forward contracts to sign before outfit is on the ground, but in this case it is entirely unnecessary as my letters are the agreement." The foregoing, coupled with other details and circumstances presented in the record, forbid us to say that the finding upon this point was without substantial support.

(b) The same conclusion must be reached touching the amount of work that was done. The real controversy was as to the amount of rock removed, and upon this there was a sharp conflict between Dean, Elrod, Sibley and Mayo on the one side, and the company's engineers—two in number—on the other. We cannot undertake to decide between these witnesses; but upon settled principles will uphold the finding of the referee as adopted by the court. (*O'Malley* v. *O'Malley*, 46 Mont. 549, 558, Ann. Cas. 1914B, 662, 129 Pac. 501.)

2. In the notice or claim of lien as filed by the plaintiffs, it is averred that the balance claimed is "for excavating and [2] building a certain piece of roadbed of the Chicago, Milwaukee & St. Paul Railway Company of Montana, being miles forty-six (46) and forty-seven (47) of the roadbed on the right of way of the said railroad company, located in Missoula county, Montana, and located on the premises hereinafter described. * * * That the said Chicago, Milwaukee & St. Paul Railway Company of Montana at the time said contract was entered into and said labor was performed and said material was furnished, was the owner of said improvement, railroad and roadbed, and

that said improvement, railroad and roadbed is situate on a certain lot, belt or strip of land on the right of way of said railway company, and being particularly described as being done near Rivulet, Montana, on miles forty-six (46) and forty-seven (47) of the survey of said Chicago, Milwaukee & St. Paul Railway Company of Montana." It is contended that this description is insufficient under the provisions of section 7291, Revised Codes, which requires the notice or claim of lien to contain "a correct description of the property to be charged with such lien, * * * but any error or mistake in the account or description does not affect the validity of the lien, if the property can be identified by the description." We cannot agree with this contention. Analyzing the description, we ascertain that the property sought to be charged with a lien is a particular portion (miles 46 and 47) of a particular property (a roadbed and railroad in Missoula county) belonging to a particular person (the Chicago, Milwaukee & St. Paul Railway Company of Montana) and located at a particular place (near Rivulet). Whether or not a description is definite depends upon what is to be described, and as the physical aspect of a railroad traversing an entire county differs from that of a house or a plot of ground, so is there a difference in the essentials of its description. Counsel for the company say: "No one can tell from the description given, at what point or place one should start from and go forty-six or forty-seven miles to be upon that portion of the road upon which respondents claim to have a lien." This perverts the language of the notice. "Miles Forty-six and Forty-seven" are not given as distances but as designations of a portion of continuous railroad. We are quite certain that anyone who wished to do so could, by starting at Rivulet, go to the company's line of railroad and find the portion thereof near Rivulet designated as "miles forty-six (46) and forty-seven (47)" unless—which does not appear—there are other portions of said railroad in that locality similarly described. An analogous situation was presented in *Western Iron Works* v. *Montana Pulp & Paper Co.*, 30 Mont. 550, 77 Pac.

413, and this court, pointing out that the property sought to be charged with the lien was monumental in character, ruled that "any description which will enable one familiar with the locality to identify the property upon which the lien is claimed is sufficient."

It is suggested, however, that in view of section 7293, Revised [3] Codes, which limits the lien on the land upon which the structure is situated to one acre, and in view of the fact that the portion of railroad sought to be charged with the lien covers approximately fifteen acres, it is impossible to fix the portion to which the lien shall apply; and therefore the description is insufficient. Attention was called in the *Western Iron Works Case,* above, to the fact that the lien is given primarily upon the structure and cannot be affected by misdescription of the land on which the structure stands, if the structure can be identified. In this view, therefore, if the portion of the railroad sought to be subjected to the lien can be identified, the lien is not defeated merely because the structure covers too much ground. Much diversity of opinion exists among the authorities as to whether a lien for work done and materials furnished in the construction of a railroad attaches to the entire railroad within the state, or to the portion thereof that is within the county wherein the lien is filed, or to the portion upon which the work was done. The fountain-head of all mechanics' liens, so called, in this state is section 7290, Revised Codes; by that section mining claims and railroads are, as possible subjects for such liens, *in pari materia;* and in *McIntyre* v. *MacGinniss,* 41 Mont. 87, 96, 137 Am. St. Rep. 701, 108 Pac. 353, this court construed section 7293 so far as mining claims are concerned. Speaking through the Chief Justice we said: "That the limitations prescribed in section 7293 do not apply to mining claims, but that a lien upon such property extends to the whole claim; this must be so because such claims cannot be divided, and the improvements and structures put upon them often cannot be removed." So that, whether we say the lien attaches to the whole of defendant company's railroad within the county, or

only to the portion thereof upon which the work was done, the extent of ground covered by it is not of vital importance, because if the lien attaches to the whole railroad within the county, the owners cannot complain that the claimant has asked for less. (*McIntyre* v. *MacGinniss, supra.*)

The decree adjudges "that plaintiffs have a first and prior lien upon the property described in plaintiffs' complaint and in the foregoing findings of fact and conclusions of law," and authorizes the sale under foreclosure of "that certain strip of land together with the railroad and improvements thereon, two hundred (200) feet in width, extending from station sixteen hundred (1600) to sixteen hundred thirty-three (1633), being thirty-three hundred (3300) feet in length, near the town of Rivulet, in Missoula county, known as the right of way and railway of said Chicago, Milwaukee & St. Paul Railway Company of Montana; * * * and also that certain strip of land two hundred (200) feet in width, known as the right of way and railway of the Chicago, Milwaukee & St. Paul Railway Company of Montana, as it is and was surveyed at the time of the filing of said lien, throughout its extent, across the county of Missoula together with the railway located thereon," *etc.* Counsel for the company omit the reference to the findings of fact and conclusions of law above quoted, and say that the description of the property authorized to be sold is different from that contained in either the notice of lien or the complaint. But the decree must be taken as a whole, and from the findings set out therein we ascertain that the strip between stations 1600 and 1633 is within "miles forty-six (46) and forty-seven (47)," and is in fact a part of the same property on which the lien is claimed and described in the notice thereof. If the plaintiffs were—as we hold—entitled to a lien upon all of miles 46 and 47, it is hard to see how the company is injured by the decree in this respect. The decree could, however, be improved by inserting the words "in miles 46 and 47" after the words "thirty-three hundred (3300) feet in length" in the last paragraph of the decree. It could also be further im-

proved by striking out of the last paragraph all that portion thereof commencing with the words "and also" and ending with the words "railway located thereon, and"—this for the reason that while the lien of plaintiffs is not defeated by the allowance of less than they have claimed, nor by their claiming less than they might have claimed, they cannot have more than their claim will justify.

The judgment and decree appealed from should be modified as above indicated, and, when so modified, should stand affirmed. So ordered.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. DONLAN, APPELLANT, *v.* BOARD OF COMMISSIONERS OF SANDERS COUNTY ET AL., RESPONDENTS.

(No. 3,414.)

(Submitted September 18, 1914. Decided October 20, 1914.)

[143 Pac. 984.]

Mandamus—Insufficient Affidavit—Bridges—Voluntary Erection by Private Person—Sale to County—Character of Property—Manner of Purchase.

Mandamus—Affidavit—Insufficiency.

1. *Mandamus* lies only to compel the performance of a clear legal duty; hence, where the affidavit for the writ did not disclose such character of duty on the part of respondent board of county commissioners, a demurrer for want of substance was properly sustained.

[As to what the writ of *mandamus* is and when it is allowable, see note in 89 Am. Dec. 728.]

Bridges—Part of Highway.

2. A bridge is part and parcel of the public highway.

Same—Voluntary Erection by Private Person—Effect.

3. Where one voluntarily erects a bridge intending that it should be a part of the public highway and belong to the public as such, or does so under an arrangement by which he might be compensated for the labor and materials furnished in constructing it, he may not claim

to be the owner, or attempt to restrain the public in the free use, thereof.

[As to duty to maintain on highway bridge not erected by highway authorities, see note in Ann. Cas. 1914A, 550.]

Same—Character of Property—Manner of Purchase by County..

4. A bridge is real estate for the purchase of which for county use the method prescribed by subdivision 8 of section 2894, Revised Codes, must be pursued.

Appeal from District Court, Sanders County; R. Lee McCullough, Judge.

Mandamus by Edward Donlan to compel the board of county commissioners to issue to him warrants in a certain amount in payment of a bridge. From a judgment for defendants, relator appeals. Affirmed.

Mr. H. H. Parsons and *Messrs. Tolan & Gaines*, for Appellant, submitted a brief; *Mr. R. F. Gaines* argued the cause orally.

No express grant of power is to be found in our Codes authorizing boards of county commissioners to purchase private bridges (as distinguished from toll-bridges). The right of the commissioners to make the contract here involved must be resolved by a determination of whether there is such authority to be found in their "implied powers." The rule is, of course, settled that boards of county commissioners must justify either under powers expressly conferred or powers necessarily implied from those expressed. (*Morse* v. *Granite County*, 44 Mont. 78, 119 Pac. 286.) Of the expressed powers to which we may turn for enlightenment on this subject, we invite attention to section 2894 of the Revised Codes, and to subdivisions 4, 8 and 25 of that section.

More or less difficulty must always be encountered in attempting to classify or determine what powers are to be "implied" in each instance. Probably every case must be an authority unto itself; but as near to a rule of general application that we have been able to find is that stated in *People* v. *Pullman's Palace Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664, as follows: "A power which the law will regard as existing by implication must be one in a sense necessary,—that is, needful,

suitable and proper to accomplish the object of the grant,—and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect or remote relation to the specific purposes of the corporation." This court has recognized this general rule, stating that every power necessary to execute the power expressly granted is necessarily implied. (*Yegen* v. *Board of County Commrs.*, 34 Mont. 79, 85 Pac. 740; *In re Farrell*, 36 Mont. 254, 92 Pac. 785; *State ex rel. Geiger* v. *Long*, 43 Mont. 401, 117 Pac. 104.)

We confidently assert that the decisions of this court relative to powers necessarily implied, the right of commissioners to select methods of procedure when the statute is silent, and the authority of commissioners with reference to highways and bridges generally, declare for the power and authority of the commissioners to make the contract referred to in Donlan's affidavit. An examination of the authorities available to the writers of this brief have disclosed but a single case at all parallel as regards facts with the case at bar. It is the case of *Bascom* v. *Oconee County*, 48 S. C. 55, 25 S. E. 984. The opinion was by a divided court. But the reasoning in both opinions, fitted to the facts present in the case at bar, furnishes authority, and we believe convincing argument, in support of the proposition that when commissioners are given general power over the laying out, controlling and management of public highways and bridges within a county, they have power impliedly to purchase a private bridge.

Mr. D. M. Kelly, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Wagner* argued the cause orally.

The bridge in question can have status only as real property. This being true, the demurrer to the petition was properly sustained, because section 2894, subdivision 8, Revised Codes, defines and limits the powers of the board of county commissioners in the acquisition of real property. The right to purchase is

given, "but no purchase of real property must be made unless the value of the same has been previously estimated by three disinterested citizens of the county appointed by the district judge for that purpose, and no more than the appraised value must be paid therefor." Here the power to purchase is expressly conferred, and the method pointed out is exclusive. The attempt to purchase in the manner indicated by relator's petition cannot be justified under the guise of implied power. (*Lebcher* v. *Board of Commrs. of Custer County*, 9 Mont. 315, 23 Pac. 713; *State ex rel. Lambert* v. *Coad*, 23 Mont. 131, 57 Pac. 1092; 11 Cyc. 468.) "The power of a county to acquire and hold real property being derived from statutes, statutory provisions as to the board of officers by whom such power is to be exercised must be strictly followed. So also provisions as to the modes to be pursued are not simply directory, but operate as a limitation upon the power to purchase, and must be followed." (11 Cyc. 459.) Though a bridge may be considered as real property, it is doubtful whether under the provisions of section 2894, above, the county has the power to purchase. (See *Morse* v. *Granite County*, 44 Mont. 78, 119 Pac. 286; *Yegen* v. *Board of County Commrs.*, *supra.*) There is no allegation that the bridge is necessary for the use of the county; hence even if the procedure outlined in section 2894 had been followed, the power of the board to make the purchase was wanting, for under the limitations prescribed, permission is given to purchase only "real or personal property necessary for the use of the county." (1 Elliott on Roads & Streets, 3d ed., sec. 55, and cases cited, *supra.*)

Even if we assume the commissioners had jurisdiction and a lawful contract was entered into, there is no allegation in the petition that the amount claimed has not been paid; and, as we understand the rules of pleading, this is a necessary allegation, at least in actions for the recovery of money by ordinary remedy. (*Hershfield & Bro.* v. *Aiken*, 3 Mont. 442; *Yancey* v. *Northern Pacific Ry. Co.*, 42 Mont. 342, 112 Pac. 533; *Roberts* v. *Treadwell*, 50 Cal. 520; *Frisch* v. *Caler*, 21 Cal. 71; *Ryan* v. *Holliday*,

110 Cal. 337, 42 Pac. 891; *Richards* v. *Lakeview Land Co.*, 115 Cal. 642, 47 Pac. 683.)

The provisions of section 2945 were not complied with by relator before instituting this proceeding. It was necessary for him to file a verified claim. (*First National Bank* v. *Custer Co.*, 7 Mont. 464, 17 Pac. 551; *Powder River Cattle Co.* v. *Custer Co.*, 9 Mont. 145, 22 Pac. 383; *Greely* v. *Cascade Co.*, 22 Mont. 580, 57 Pac. 274.)

MR. JUSTICE SANNER delivered the opinion of the court.

Mandamus by Edward Donlan, the relator and appellant, to compel the board of county commissioners of Sanders county to issue to him county warrants to the amount of $9,791.42 in payment for a bridge. In his amended affidavit for the writ the relator averred: That prior to March 10, 1913, he was the sole owner and entitled to the possession of a certain wagon bridge across the Flathead river near Perma, in the county of Sanders, which bridge "as finally constructed, united certain divided portions of a public highway"; that for sometime prior to March 10, 1913, negotiations had been carried on between him and the board looking to the purchase of said bridge, which negotiations finally, and on March 10, 1913, culminated in a contract whereby the board agreed to purchase said bridge from him "and pay therefor such a sum of money, not exceeding $10,000, as should be determined to be the fair cash valuation thereof, which fair cash valuation was to be fixed and determined by seven commissioners, all disinterested persons, three of which commissioners were to be appointed by respondents, three by said Edward Donlan, and one by the judge of the district court of the district in which Sanders county is situated, and which fair cash valuation, when determined by said commissioners, was to be reported under oath to said respondents"; that such commissioners were appointed; that they met and proceeded to investigate and determine the fair cash valuation of the bridge, and on July ——, 1913, made their unanimous report under oath to the board declaring the value of the bridge to be

$9,791.42; that thereafter, on July 10, 1913, the relator made written demand upon the board for the issuance and delivery to him of county warrants in said sum; that the board on the same day, "after considering the aforesaid demand, by action taken in meeting duly assembled, declined and refused to proceed further in the matter of the purchase of and payment for said Perma bridge, and did further decline and refuse to take any further action of any kind in connection with the matter, assigning as their sole reason therefor an existing doubt as to their authority to purchase said bridge"; that ever since March 10, 1913, the said bridge "has been accepted for use and used by respondents as a part of the aforesaid public highway, and has been at all said times used by the traveling public of Sanders county, as and for a portion of a public highway within said county"; that at all times since August ——, 1913, there has been in the possession of the county clerk of Sanders county, subject to delivery to the board upon its application therefor, "a conveyance from Edward Donlan and wife unto the county of Sanders, of all of the right, title and interest of the grantors in and to said Perma bridge." Other allegations, largely of a legal character, are appended to complete the affidavit. The respondents demurred on sixteen specified grounds, the sum of which is to challenge the sufficiency of the affidavit to justify the writ. The demurrer was sustained, and the relator, electing to stand upon his pleading, has appealed.

We think the ruling was correct. *Mandamus* lies only to [1] compel the performance of a clear legal duty (Revised Codes, sec. 7214), and the amended affidavit—to say the utmost possible for it—does not show a clear duty on the part of the board to issue the warrants demanded. We subjoin some of the reasons why this is so, without adverting to others which may suggest themselves. The relator alleges that when the [2, 3] contract of purchase was made, he was the owner of the bridge in question, having become such owner by constructing it so as to connect portions of a public highway separated by the Flathead river. This averment is self-destructive, potentially at least, for it means that he entered upon an existing

public highway, and, for reasons not disclosed, he affixed thereto a structure which became a part thereof. (*State ex rel. Foster* v. *Ritch*, 49 Mont. 155, 140 Pac. 731; Revised Codes, secs. 4425, 4427.) When this occurred does not appear, but from its occurrence—unexplained—certain inferences are permissible, among them these: That he acted as a mere volunteer intending that the bridge erected by him should be a part of the highway and belong to the public as such (Revised Codes, secs. 1337, 4572; Laws 1913, p. 139, sec. 3); or that he acted under some arrangement by which he might be compensated for the labor and materials furnished. In neither of these events could he be the owner of the structure as such or restrain the public in the free use thereof; nor in either of these events could the county commissioners legally contract to purchase it, because to all intents and purposes it belonged to the public.

Assuming, however, that there were circumstances not disclosed by the affidavit, which suffice to avoid the conclusion above stated and permit us to say that the bridge was the property of the relator, what kind of property was it? A bridge is of [4] necessity affixed to the realty and is real estate—as much real estate as the remainder of the highway of which it is a part. It is not claimed that the bridge in question was a toll-bridge, and our Code contained no provision touching the purchase of a private bridge as such; but it did and does contain a provision authorizing the county commissioners to purchase real estate for the use of the county. For such a purchase a method is prescribed by statute (Revised Codes, sec. 2894, subd. 8), and this method was not pursued in the transaction at bar. This being true, the proceedings were without legal sanction, and it was not the duty of the board to carry them further.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY, being absent, takes no part in the foregoing decision.

GARY BROS. & GAFFKE CO., RESPONDENT, *v.* CHICAGO, M. & P. S. RY. CO., APPELLANT.

(No. 3,410.)

(Submitted September 19, 1914. Decided October 22, 1914.)]

[143 Pac. 955.]

Carriers—Railroads—Injury to Goods at Destination—Nature of Liability.

Carriers of Freight—Nature of Liability.

1. The rule which relieves a common carrier, as such, from liability for injury to goods, upon placing the cars where they can be conveniently unloaded by the consignee, does not relieve from all liability but merely changes the liability from that of carrier to that of warehouseman. (Rev. Codes, sec. 5311.)

[As to liability of carrier when reduced to that of warehouseman, see notes in 97 Am. St. Rep. 84; Ann. Cas. 1914B, 778.]

Same—Contract of Carriage—Liability Thereunder.

2. Where, under a contract of carriage as indorsed on the bill of lading the consignee of a shipment of potatoes had forty-eight hours after notice of their arrival at destination within which to remove them before defendant railway company's liability as carrier ceased, and the potatoes were not removed within that time, but froze in the cars, it was answerable for the consequent damage under its liability as thus fixed.

[As to when carrier's liability ends and what amounts to delivery, see note in 8 Am. Dec. 214.]

Appeal from District Court, Gallatin County; Ben. B. Law, Judge.

ACTION by Gary Bros. & Gaffke Company against the Chicago, Milwaukee & Puget Sound Railway Company. Judgment for plaintiff. Defendant appeals from the judgment and from an order denying it a new trial. Affirmed.

Messrs. Hartman & Hartman, for Appellant, submitted a brief; *Mr. Walter E. Hartman* argued the cause orally.

We contend that the spotting of the two cars on appellant's delivery track, the notification to consignee of their arrival and spotting there, his taking possession of the same, inspecting them as they stood upon said track, finding them in good condition and so notifying the agents of the company, on the afternoon

of the 26th of October, his subsequent sale on that day of one of the cars to a purchaser who also inspected them in connection with the consignee, under the facts as disclosed by the record constitute a delivery of the cars to the consignee on the afternoon of October 26; that consignee's failure to request or to notify appellant's agents that they were expected to further look after the cars estopped him or the respondent from claiming damages for their freezing during the night of the 26th or the morning of the 27th; and that the provisions of the first paragraph of section 5 on the back of the contract of shipment, and section 8 of said contract providing: "That the owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery," in no wise apply to a shipment where delivery has been effected prior to the expiration of forty-eight hours after notice or prior to the payment of the freight. (See 6 Cyc. 456, 457; *Independence Mills Co.* v. *Burlington etc. Ry. Co.*, 72 Iowa, 535, 2 Am. St. Rep. 258, 34 N. W. 320; *MacVeagh & Co.* v. *Atchison, T. & S. F. R. Co.*, 3 N. M. 205, 5 Pac. 457; *Gregg* v. *Illinois Central Ry. Co.*, 147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 343; *Whitney Mfg. Co.* v. *Richmond & Danville R. R. Co.*, 38 S. C. 365, 37 Am. St. Rep. 767, 17 S. E. 147; *Rothchild Bros.* v. *Northern Pac. Ry. Co.*, 68 Wash. 527, 40 L. R. A. (n. s.) 773, 123 Pac. 1011; *Kenny Co.* v. *Atlanta W. P. R. Co.*, 122 Ga. 365, 50 S. E. 132; *Arkadelphia Mill Co.* v. *Smoker Merchandise Co.*, 100 Ark. 37, 139 S. W. 680; *Vaughn* v. *New York N. H. & H. R. Co.*, 27 R. I. 235, 61 Atl. 695; *Anchor Mill Co.* v. *Burlington, C. R. & N. R. Co.*, 102 Iowa, 262, 71 N. W. 255.) Where goods are shipped to a point on the carrier's line where there is no agent, depot or warehouse, and this is distinctly understood by the consignee at the time of the shipment and is not unreasonable in view of the condition of the carrier's business, a complete delivery of the goods is effected by the carrier's safely delivering the car containing them on the sidetrack at its destination (*South & North Ala. R. Co.* v. *Wood*, 66 Ala. 167, 41 Am. Rep. 749); especially where the consignee also

assumes control of the car and its contents, by proceeding to unload a part of the goods, and by locking the car with a lock of his own, upon leaving it for the night partly unloaded. (*Southern R. Co.* v. *Barclay*, 1 Ala. App. 348, 56 South. 26.)

But in *Missouri P. R. Co.* v. *Wichita Wholesale Grocery Co.*, 55 Kan. 525, 40 Pac. 899, it was held that a carload of goods was not delivered to the consignee, so as to relieve the carrier from liability as such for the loss thereof by fire, although the carrier had placed the car upon a spur track at the rear of consignee's warehouse, at the exact place where the consignee was accustomed to receive and unload its freight, where the car was so placed on Sunday afternoon, and it was consumed by fire before business hours on Monday morning. In this case, the court said: "It [the carrier] cannot make a constructive delivery except at a time when the plaintiff might reasonably be required to receive it, and that could only be during business hours of a business day, where there was no custom or agreement to receive at any other time." (See, also, *Eagle* v. *White*, 6 Whart. 505, 37 Am. Dec. 434.) Nor is there a delivery of a carload of goods by the carrier where it merely places the car containing them on the unloading track, and such cars are usually placed, and notifies the person for whom the goods are intended, who, without the knowledge or consent of the carrier, and without authority from the consignee, breaks the seal of the car, inspects the goods, and refuses to accept them or to pay the draft attached to the bill of lading therefor. (*Yuille-Miller Co.* v. *Chicago, I. & L. R. Co.*, 164 Mich. 58, 128 N. W. 1099; *Schopp Fruit Co.* v. *Missouri P. R. Co.*, 115 Mo. App. 352, 91 S. W. 402.)

We submit that under the authorities above cited the potatoes in question were delivered to Downing, the consignee, on the afternoon of October 26.

The provision of the first paragraph of section 5 on the back of the way-bill, that property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent and given

may be kept in a car, *etc.*, evidently refers to and is controlling over all shipments which arrive at the point of destination. When they so arrive notice must be given of their arrival. After such notice is given the party notified has forty-eight hours within which to remove the same, and if he does not remove it within the forty-eight hours, it may then be held by the carrier subject to its liability as warehouseman only. Until the end of the forty-eight hours, the carrier holds it subject to its liability as carrier. It applies only to goods which have not been delivered. And if, as we contend, these goods were delivered, the provision does not apply.

Mr. John A. Luce, for Respondent, submitted a brief and argued the cause orally.

Originally all carriers were required to deliver freight to the place of business of the consignee. The rule has been gradually relaxed in favor of railroads until two rules have been formulated. These are the New Hampshire rule and the Massachusetts rule. These are further modified into what is known as the New York rule. The Massachusetts rule is: When the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended also, and he is responsible as warehouseman only. This was first announced in *Thomas* v. *Boston & P. R. Corp.*, 10 Met. 472, 43 Am. Dec. 444. This rule has been followed in Georgia, Illinois, Indiana, Iowa, Missouri, North Carolina, Pennsylvania and South Carolina. (2 Hutchinson on Carriers, sec. 702.) The New Hampshire rule is: Merely placing the goods in the warehouse or on a track does not discharge the carrier, but he remains liable as such until the consignee has had a reasonable time after their arrival to inspect and take them away in the common course of business. First announced in *Moses* v. *Boston & M. R. Co.*, 32 N. H. 523, 64 Am. Dec. 381, in which it was said that while the Massachusetts rule was of a "plain, precise and practical character," that "by it the salutary and approved principles of the common law

are sacrificed to considerations of convenience and expediency." This rule is followed in Alabama, Arkansas, California, Connecticut, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New York, Ohio, Texas, Vermont, Wisconsin and West Virginia. (2 Hutchinson on Carriers, sec. 704.) The so-called New York rule is only a stronger application of the New Hampshire rule. (*Id.*, sec. 708; 6 Cyc. 458.) The better reasoning supports the New Hampshire rule. But by either of these rules, unless the railroad unloads and warehouses the freight, it is liable as carrier until after notice and a reasonable time to inspect and remove. (*Chicago & N. W. Ry. Co.* v. *Bensley*, 69 Ill. 630; *Chicago etc. Ry. Co.* v. *Sawyer*, 69 Ill. 285, 18 Am. Rep. 613; *Porter* v. *Chicago etc. Ry. Co.*, 20 Ill. 407, 71 Am. Dec. 286; *Mobile & G. R. Co.* v. *Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *Columbus & W. R. Co.* v. *Ludden*, 89 Ala. 612, 7 South. 471; 42 Am. & Eng. R. R. Cas. 404.) Placing cars upon the sidetrack ready for delivery does not constitute a delivery nor relieve the carrier until the consignee has reasonable time to inspect and to remove the goods. (*Leavenworth etc. R. R. Co.* v. *Maris*, 16 Kan. 333; affirmed in *Missouri Pac. Ry. Co.* v. *Wichita W. Grocery Co.*, 55 Kan. 525, 40 Pac. 899; *McGregor* v. *Oregon R. R. & Nav. Co.*, 50 Or. 527, 14 L. R. A. (n. s.) 668, 93 Pac. 465; *Walters* v. *Detroit United R. Co.*, 139 Mich. 303, 102 N. W. 745; *Hicks* v. *Wabash R. Co.*, 131 Iowa, 295, 8 L. R. A. (n. s.) 235, 108 N. W. 534; *Normile* v. *Northern Pac. R. Co.*, 36 Wash. 21, 67 L. R. A. 271, 77 Pac. 1087; *Wood* v. *Crocker*, 18 Wis. 345, 86 Am. Dec. 773; *Burr* v. *Adams Exp. Co.*, 71 N. J. L. 263, 58 Atl. 609; *Winslow* v. *Vermont N. R. Co.*, 42 Vt. 700, 1 Am. Rep. 365; 5 Am. & Eng. Ency. of Law, 2d ed., 268; *Fisher* v. *Northern Pac. Ry. Co.*, 49 Wash. 258, 126 Am. St. Rep. 867, 94 Pac. 1073.)

Under section 5309, Revised Codes, it was incumbent upon appellant to deliver the potatoes to the consignee. Under the provisions of section 5311, not having delivered the freight personally to the consignee or his agent, it was incumbent upon it to give notice to the consignee of its arrival, to keep the same

in safety upon its responsibility as a warehouseman, until the consignee had a reasonable time to remove it. This reasonable time was provided by the bill of lading to be forty-eight hours after the notice. This contract is capable of only one construction, and that is, it extends the liability as a carrier beyond the time of giving notice, to which the statute limits it, and to forty-eight hours after such notice. A contract somewhat similar to this was considered in the case of *Scheu* v. *Benedict*, 116 N. Y. 510, 15 Am. St. Rep. 426, 22 N. E. 1073. The court said: "If the consignee neglects to accept or to receive the goods, the carrier is not thereby justified in adandoning them or in negligently exposing them to injury. If they are not accepted and received when notice is given of their arrival, he may relieve himself from responsibility by placing the goods in a warehouse for and on account of the consignee, but so long as he has the custody, a duty devolves upon him to take care of the property and preserve it from injury." (See, also, *Tarbell* v. *Royal Exchange Shipping Co.*, 110 N. Y. 170, 6 Am. St. Rep. 350, 17 N. E. 721; *Hathorn* v. *Ely*, 28 N. Y. 78; *Fisk* v. *Newton*, 1 Denio, 45, 43 Am. Dec. 649; *Price* v. *Powell*, 3 N. Y. 322; *Fenner* v. *Buffalo etc. R. R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709.)

Defendant was guilty of gross negligence of its duty to "safely keep" the property. The injury was not caused by an irresistible superhuman cause, but could have been easily prevented by the shipping in proper cars or by ordinary care after the Butte agents had been warned of the storm and to care for perishable property. (Sec. 5354, Rev. Codes; *Ryan* v. *Rogers*, 96 Cal. 349, 31 Pac. 244; *Fay* v. *Pacific Improvement Co.*, 93 Cal. 253, 27 Am. St. Rep. 198, 16 L. R. A. 188, 26 Pac. 1099, 28 Pac. 943; *Dorman* v. *Ames*, 12 Minn. 451 (Gil. 341).) The goods being perishable, it was negligence for appellant not to take the proper precautions against freezing. (*Wing* v. *New York etc. R. R. Co.*, 1 Hilt. (N. Y.) 243.) In fact, the rule is stricter where freight is perishable. (5 Am. & Eng. Ency. of Law, 2d ed., 165, 253, 364.)

MR. JUSTICE SANNER delivered the opinion of the court.

The respondent, a corporation, complained that on the 21st and 23d days of October, 1911, it delivered to the appellant, a common carrier, at Patterson, Gallatin county, Montana, two cars of potatoes in good condition, of the value of $932.42, to be safely carried to Butte and there delivered to F. C. Downing upon payment of the freight charges thereon; that the appellant "did not safely carry and deliver said potatoes, which were goods of a perishable nature, but on the contrary so negligently conducted and so misbehaved in regard to the same as such carrier that the same were not delivered in good condition to said F. C. Downing but were injured and rendered worthless and wholly lost" to the respondent, to his damage, *etc.* The answer admits the delivery by respondent to the appellant of the potatoes in good condition for carriage as stated, denies the neglect of duty imputed to it, and alleges that if the potatoes were injured or rendered worthless, it was caused by the negligence of respondent or its consignee Downing, in this: that Downing was notified by appellant's agent of the arrival of the potatoes on the morning of October 26, 1911; that he thereupon came to appellant's office and requested appellant's agents to set the cars out upon its delivery track, which was done; that he then and there inspected the potatoes and accepted and took charge of the same; that the potatoes remained in the cars on the delivery track during the afternoon and night of October 26 without any request having been made by Downing or anyone else that appellant should take any precautions to prevent the potatoes from freezing or exercise any care or supervision over them; that on October 27 Downing informed appellant's agent the potatoes were frozen; that if the potatoes were frozen or in any way injured by cold, it occurred after Downing had taken the custody of and responsibility for the same. The effect of the reply is to deny that Downing accepted or took charge of the potatoes or that they had been delivered to him at the time they were frozen.

The trial was to the court sitting without a jury. There was no dispute but that the potatoes arrived in Butte on the morning of October 26 in good condition; that they were frozen sometime during the night of the 26th or on the morning of the 27th, and that by such freezing they were rendered practically worthless. "The question litigated was whether, in the light of the facts, there was a delivery of the potatoes on the 26th; if so, it is contended the appellant was not liable; if not, it was liable." The court found the issues for the respondent and judgment went accordingly. Appellant moved for a new trial, and this was by order of the court denied. The cause is before us on appeal from that judgment and from that order.

The evidence upon the question at issue is not seriously conflicting. The potatoes arrived at Butte on the morning of October 26 and were placed upon the team track on the appellant's own motion; this is the track customarily employed for the deposit of cars the contents of which were to be unloaded by teams. The consignee, however, did not always unload from this track, but as between him and the appellant it was the custom for the latter to place cars upon the B. A. & P. track if the consignee so requested. Notice of the arrival of the cars was given to the consignee by telephone about noon, and in the afternoon he appeared at appellant's office, ascertained the numbers of the cars and where they were, went to them, entered them and examined the potatoes. Finding the potatoes in good condition, he went up town, met a Mr. Rabbitt, who wished to buy some potatoes, and the two returned to the cars, examined the potatoes, and Rabbitt agreed to take one of the cars. These parties went back up town and the consignee made arrangements with a teamster for unloading to begin the following day. The cars were left upon the team track and on that night were frozen.

As we understand the appellant's contention, it is that the foregoing facts suffice to relieve it from all liability (1) under the statutes of this state, (2) at common law, and (3) under the contract between the parties.

1. The Revised Codes of this state provide that the liability of a railway carrier, as such, continues from the time it accepts the property until it is relieved (sec. 5353) in one of the following ways: (a) By delivering the property to the consignee at the place to which it is addressed, in the manner usual at that place (sec. 5309), or, if there is no usage to the contrary, delivery may be had at the station nearest the place to which the property is addressed (sec. 5310); (b) if the property is not delivered to the consignee or his agent personally, notice of its arrival must be given to him, and the carrier must, upon its responsibility as a warehouseman, keep the property until the consignee has had a reasonable time to remove it (sec. 5311), or, if the consignee does not accept and remove the property after the carrier has fulfilled, or duly offered to fulfill, its obligation to deliver, the carrier may exonerate itself from further liability by placing the freight in a suitable warehouse on storage, *etc.* (sec. 5312). Concerning the application of these sections, it is sufficient to say that no attempt was made to follow the provisions of section 5312; that section 5310 does not define the acts which may constitute delivery in the absence of custom; that section 5311 does not apply if a personal delivery is claimed, and if a personal delivery is not claimed and section 5311 does apply, its effect is not to relieve from all liability, but to change the liability from that of carrier to that of warehouseman. We are thus left to section 5309, which likewise is not meant for cases of actual, manual delivery, because these need no aid from statute or custom, but to those cases where, by following custom, a delivery may be accomplished short of the actual, manual transfer of the goods. So considered, section 5309 is not brought to bear for two reasons, *viz.*, the terms of the contract of carriage and the fact that while the evidence shows the placing of cars upon the team track to be a part of the usual manner of delivering freight in carload lots, at Butte, it is not established that, in the absence of contract, delivery is customarily accomplished at Butte by that act or by all the circumstances narrated above.

2. Whether or not a delivery was accomplished on October 26 sufficient to absolve the appellant at the common law is not, in our judgment, of great importance in view of the contract between the parties. It may be said in passing, however, that the rule invoked which relieves the carrier as such from [1] liability upon placing the cars where they can be conveniently unloaded by the consignee cannot aid the appellant, for it does not relieve from all liability, but, like section 3511, Revised Codes above, merely changes the liability from that of carrier to that of warehouseman. (2 Hutchinson on Carriers, sec. 711; 6 Cyc. 457, par. III; *MacVeagh & Co.* v. *Atchison, T. & S. F. Ry. Co.*, 3 N. M. 205, 5 Pac. 457; *Gregg* v. *Illinois Central Ry. Co.*, 147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 343; note to *East Tennessee, V. & G. Ry. Co.* v. *Kelly*, 17 L. R. A. 691 *et seq.*)

3. The contract of carriage indorsed upon the bill of lading contains the following provisions: "The carrier * * * of [2] the property described shall be liable for any loss thereof or damage thereto, except as hereinafter provided. * * * For loss, damage or delay caused by fire occurring after forty-eight hours after notice of the arrival of the property at destination has been duly sent or given, the carrier's liability shall be that of warehouseman only. * * * Property not removed by the party entitled to receive it within forty-eight hours after notice of its arrival has been duly sent or given, may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only," *etc.* The meaning of this language cannot be mistaken, and the distinguished counsel for appellant does not mistake it. He says: It "evidently refers to and is controlling over all shipments which arrive at the point of destination. When they so arrive notice must be given of their arrival. After such notice is given, the party notified has forty-eight hours within which to remove the same, and if he does not remove it within forty-eight hours, it may then be held by the carrier subject to its liability as warehouseman only.

Until the end of the forty-eight hours, the carrier holds it subject to its liability as carrier. But it goes without saying, of course, that that refers only to property that has not been delivered." The implications of this admirable analysis are apparently not foreseen. They are, that the protection afforded by section 5311, Revised Codes, under which the liability of the carrier becomes changed to that of warehouseman immediately upon giving notice, is waived; that the effect of the Massachusetts rule under which the liability of the carrier becomes changed to that of warehouseman when the cars are placed conveniently for unloading is dispensed with; and that the only thing which will exonerate the carrier, as such, within forty-eight hours is the removal of the property. In other words the contract itself not only fixes the liability of the carrier, but defines the character of the delivery which will suffice to avoid it. Confessedly, the proof shows no such delivery on October 26. Whatever, in the absence of the contract, might have been the effect of the circumstances disclosed by the evidence, there was no removal of the potatoes before they were frozen. The appellant having undertaken to answer for their safety under its liability as carrier until they were removed within forty-eight hours, cannot now invoke the aid of any other rule.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY, being absent, takes no part in the foregoing decision.

EDWARDS, RESPONDENT, *v.* PLAINS LIGHT & WATER CO., APPELLANT.

(No. 3,411.)

(Submitted September 19, 1914. Decided October 26, 1914.)

[143 Pac. 962.]

Contracts of Employment—Breach—Evidence—Corporations—Board of Directors—Officers—Powers—Measure of Damages.

Contract of Employment—Evidence—Sufficiency.

1. Evidence, including letters interchanged between the president of defendant corporation, signed by him personally, and plaintiff, considered in the light of the circumstances under which they were written, *held* to show a contract of employment for a certain term, for the breach of which plaintiff was entitled to recover.

[As to contracts for permanent employment, see note in 51 Am. St. Rep. 301.]

Same—Corporations—Acts of President—When Deemed Act of Principal.

2. Where the evidence showed that it was the intention of the president of a corporation the stock of which, with the exception of three shares for which the holders paid nothing, was owned by himself, to bind the company by letters written by him personally and relied on by plaintiff to establish a contract of employment, it became bound, under section 5449, Revised Codes, as fully as if a formal contract had thereafter been executed in its name.

[As to authority of general manager or agent of corporation to hire employees, see note in Ann. Cas. 1914B, 831.]

Same—Validity—Estoppel.

3. The by-laws of defendant corporation provided, *inter alia*, that its president could execute contracts only upon approval by the board of directors. That officer had been permitted by the board—the members of which were his employees in other enterprises and held a share of stock each for which they had paid nothing—to exercise all its powers, in the management of the business, the board remaining inactive. *Held* that the president, under such circumstances, at the time he entered into the contract of employment was vested with the powers of the board, and the corporation was thereafter estopped to question the validity of his act.

[As to authority of officer to represent corporation as inferred from manner in which he has been permitted to act, see note in Ann. Cas. 1913D, 646. And see note in Ann. Cas. 1912D, 296.]

Same—Corporations—Duties and Powers of Directors and Officers.

4. Though section 3836, Revised Codes, provides that the directors must perform the duties enjoined upon them by statute and the by-laws of their corporation, *etc.*, its general executive officer may, specifically or by implication, be authorized by them to conduct its business under their directions.

[As to necessity of action by directors to validate corporate act, see note in Ann. Cas. 1912C, 300.]

Same—Measure of Damages.

5. The measure of damages in an action to recover for the breach of a contract of employment is the amount plaintiff would have earned had he remained in the employment, at the rate stipulated, to the end of the term—even though trial is had before expiration of it—less any amount he received for services rendered to others or might have received by the exercise of diligence to secure profitable employment after his discharge.

[As to what is contract for personal services within the rule that damages for breach may be mitigated by earnings of employee in other employment, see note in Ann. Cas. 1914A, 810.]

Appeal from District Court, Sanders County; R. Lee McCullough, Judge.

ACTION by C. O. Edwards against the Plains Light & Water Company. Judgment for plaintiff. Defendant appeals from the judgment and an order denying its motion for a new trial.

Cause submitted on briefs of counsel.

Messrs. Galen & Mettler and *Mr. I. R. Blaisdell,* for Appellant.

The president has no power to bind the corporation, but his power as an agent of the corporation must be founded on the organic law thereof, or on a delegation of authority from the board of directors, and his duties arising from his office as president are confined to presiding, and voting as a director. (*Ex parte Rickey,* 31 Nev. 82, 135 Am. St. Rep. 651, 100 Pac. 134; *Black* v. *Harrison Home Co.,* 155 Cal. 121, 99 Pac. 494.) The manager of a corporation held not to have had authority to bind the corporation by a contract to employ a clerk for a specified term. (*Francis* v. *Spokane Am. Athletic Club,* 54 Wash. 188, 102 Pac. 1032.) Acts and declarations of a director of a corporation in his individual right are not binding on the corporation, unless he has been appointed its agent, or his acts or declarations have been ratified. (*Guillaume* v. *K. S. D. Fruit Land Co.,* 48 Or. 400, 86 Pac. 883, 88 Pac. 586.) Proof that a person is the secretary of a corporation is not sufficient alone to establish his authority to make contracts for the corporation. (*Danaldson* v. *Orchard Crude Oil Co.,* 6 Cal. App. 641, 92 Pac.

1046.) A corporation is not liable on an agreement made by one or two of its trustees in the absence of authority to bind the corporation having been delegated to such trustees, or ratification of the agreement by the corporation. (*Wagner* v. *St. Peter's Hospital*, 32 Mont. 206, 79 Pac. 1054.) The secretary and general manager of a mining corporation has no implied power by virtue of his office to bind the corporation by a contract for medical attendance on injured employees. (*Spelman* v. *Gold Coin M. & M. Co.*, 26 Mont. 76, 91 Am. St. Rep. 402, 55 L. R. A. 640, 66 Pac. 597.) The president of a corporation has no power as such to employ a general business managing agent without the consent of the directors. (*Vogel* v. *St. Louis Museum etc. Co.*, 8 Mo. App. 587.) An agent of a corporation cannot bind his principal by a contract of employment unless authority to make such a contract was conferred upon him by the board of directors. (*Wm. Tarr Co.* v. *Kimbrough*, 17 Ky. Law Rep. 1284, 34 S. W. 528.) The president has no general authority to contract for the corporation. (*St. Claire* v. *Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; *Stanley* v. *Sheffield Land etc. Co.*, 83 Ala. 260, 4 South. 34; *Varney* v. *Hutchinson Lumber Co.*, 70 W. Va. 169, 73 S. E. 321; *Templin* v. *Chicago etc. Ry. Co.*, 73 Iowa, 548, 35 N. W. 634; *Schmeling* v. *Rockford etc. Co.*, 154 Ill. App. 308; *Griffith* v. *Chicago etc. Ry. Co.*, 74 Iowa, 85, 36 N. W. 901; *MacBean* v. *Irvine*, 7 Ky. 17; *Mt. Sterling etc. Co.* v. *Looney*, 58 Ky. 550, 71 Am. Dec. 491.) Contract of corporation must be authorized by the board of directors. (*Alta Silver Min. Co.* v. *Alta Placer M. Co.*, 78 Cal. 629, 21 Pac. 373.) An agreement of the president of a private corporation will not be evidence against the corporation unless it is shown to be within the scope of his authority. (*Farmers' Bank* v. *McKee*, 2 Pa. 318; *Potts etc. Liquor Co.* v. *Potts*, 135 Ga. 451, 69 S. E. 734.)

The mere fact that plaintiff was employed by defendant corporation, and was paid by it from month to month for his services, is not proof that it made any contract with plaintiff to employ him for three years, or any other specific period of

time; nor is it proof that defendant corporation ratified any contract which J. A. McGowan might have made with the plaintiff; because there is no proof that any other officer or director of defendant corporation except J. A. McGowan had any knowledge of the terms of any such agreement.

The board of directors of a corporation cannot ratify a contract made by its general manager without authority, unless the board has full knowledge of the terms of the contract. (*Lincoln Mountain G. M. Co.* v. *Williams*, 37 Colo. 193, 85 Pac. 844.) One suing a corporation on an agreement made with an officer thereof cannot rely on the failure of the corporation to repudiate the contract, in the absence of a showing that the corporation had an opportunity to ratify the contract or repudiate it. (*Id.*) A corporation is not chargeable with notice that an officer having no authority to do so has executed a note in its name. (*Helena Nat. Bank* v. *Rocky Mountain Bell Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.) The doctrine that the knowledge of a corporate officer is imputable to the corporation does not apply to work performed on the corporate property under a contract with a director in his individual capacity, and with the understanding that he shall be personally liable. (*Ayers* v. *Green Gold Min. Co.*, 116 Cal. 333, 48 Pac. 221.) A corporation will not be estopped to disaffirm an unauthorized contract by receiving the benefits thereof unless it had knowledge of the contract. (*Rideout* v. *National Homestead Assn.*, 14 Cal. App. 349, 112 Pac. 192.)

In a suit for breach of an agreement to hire the plaintiff for a term not yet expired, prospective damages cannot be given. but only damages suffered from the time of the breach to the day of the trial. (*Gordon* v. *Brewster*, 7 Wis. 355.) The above case is the only one which we have been able to find in which the precise point was passed upon, and an examination will disclose that it is on all-fours with the case at bar. There are, however, a number of other cases in which the same principle has been upheld by the courts. (*Moore* v. *Love*, 48 N. C. (3 Jones) 215; *Hunt* v. *Tibbetts*, 70 Me. 221; *Tucker* v. *Tucker*, 24

Mich. 426; *Terry* v. *Beatrice Starch Co.*, 43 Neb. 866, 62 N. W. 255; *De Costa* v. *Massachusetts F. W. & Min. Co.*, 17 Cal. 613.)

Messrs. Tolan & Gaines, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for breach of a contract of employment. It is alleged in the complaint that on April 24, 1910, at Battle Creek, Michigan, the plaintiff and the defendant mutually agreed that plaintiff should serve defendant as its superintendent at Plains, Montana, for a term of three years beginning on May 1, 1910, to receive therefor wages at the rate of $100 per month; that plaintiff entered upon the performance of the services required under the agreement, and has ever since been and is now ready to perform them; and that the defendant on August 31 1911, wrongfully discharged plaintiff and refused to permit him to continue in its employment, to his damage in the sum of $2,000. The answer, after joining issue upon all the allegations of the complaint, except the corporate capacity of the defendant, interposed specially the defenses (1) that the contract alleged in the complaint was void, for that it was not in writing nor subscribed by the defendant or its agent, as required by section 5017 of the Revised Codes; and (2) that, while the plaintiff was in the employment of the defendant from May 1, 1910, to August 31, 1911, he was at the date last mentioned discharged therefrom for gross misconduct, incompetency and lack of attention to defendant's business. Upon these allegations there was issue by reply. The plaintiff had verdict and judgment for $1,200. Defendant has appealed from the judgment and an order denying its motion for a new trial.

The sufficiency of the evidence to justify the verdict was challenged in the trial court by motion for nonsuit and also on motion for a new trial, and the principal contention made in this court is that the trial court erred in refusing to grant a new trial on that ground. There was little substantial conflict

in the evidence, except in so far as it related to the question whether the discharge of the plaintiff was justifiable. On this issue the evidence was in sharp conflict. This feature of the case may, therefore, be passed without further notice than to say that the finding of the jury thereon is conclusive on this court. The determinative question in the case is whether the [1] facts disclosed a contract upon which the plaintiff was entitled to recover at all.

The defendant corporation was organized under the laws of Montana on or about July 1, 1909, with a capital stock of 500 shares, its place of business being at Plains, Montana. Of these shares, J. A. McGowan held 497; C. H. Rittenour, E. L. Johnson and F. W. Lewellyn each held one. On July 1, McGowan, Rittenour and Johnson were elected directors and, respectively, president, vice-president and treasurer. Lewellyn was made secretary. Rittenour and Johnson paid nothing for the shares held by them. Lewellyn did not testify, but it is inferable from the evidence that he paid nothing for his share. They were all stockholders and employees of the McGowan Commercial Company, a corporation doing business at Plains, and the First National Bank of Plains, in both of which McGowan was the principal stockholder. Apparently, they held their stock in the light and water company as an accommodation to McGowan, to perfect and maintain its organization. Though the company erected and put into operation a combined electric light, heating and water plant to supply the inhabitants of Plains with light and water, after the organization of the company but a single meeting of the board of directors was held prior to November 30, 1911, about two months after the cause of action involved herein arose. This meeting was held on October 13, 1909, for the purpose of authorizing an issuance of bonds of the company to secure the funds necessary to erect its plant. McGowan, the president, up until the time of his death on April 1, 1911, had exclusive control of the affairs and operations of the company. One witness who had been employed by the company, stated: "Mr. McGowan was the whole works." He contracted for the

erection of the building for the light and heating plant, hired and discharged workmen, and apparently purchased the material both for the building and for the installation of the wire and pipe lines. Later, the affairs of the company not being prosperous, it became necessary for it to borrow money to meet its pressing demands. It is a fair inference from the evidence that McGowan secured such funds as were needed, upon the credit of the company without consulting the board of directors. In the early part of the year 1910 he opened negotiations with the plaintiff, who then resided at Battle Creek, Michigan, for the purpose of securing his services as superintendent of the company's plant then approaching completion. The negotiations were at first through personal conferences between the two, the purpose for which plaintiff's services were sought being fully understood by both. McGowan was then in Battle Creek to secure medical treatment. After he returned to Plains the negotiations were continued by letter, and finally culminated in a contract, as is evidenced by the following letter from McGowan—written on a printed letter-head of the McGowan Commercial Company—and the reply thereto by plaintiff:

"Plains, Mont., Mar. 11, 1910.

"Mr. Chas. O. Edwards,

"181 W. St., Battle Creek, Mich.

"Dear Sir:

"I am willing to make you the following proposition: If you will come here with your family and take charge of the electric light and heating plant and help install the heating plant and the light plant and do whatever is necessary to be done in connection therewith and not be a stickler for hours—at times you would be required to work quite long hours, at other times your hours would be short—you will have no one to give you orders but myself and that with reference to the management only, I will guarantee to pay you $100 per month and give you a contract for three years. At the expiration of that time should your work prove satisfactory and successful, we will increase your pay and will sell you stock in this proposition, the entire

stock of which is owned by myself. We would probably want you here by the first of May. Should the material for the heating plant arrive a little earlier we would probably want you too at that time as I would want to have the man who is going to take charge of this work be here and work on the entire proposition of heating, and placing of the electrical machinery.

"Should this proposition meet with your approval, advise me at your earliest convenience. Should you require some money to enable you to get your household effects and family here, you can advise me of the amount needed and I will advance the same.

"I sent you under separate cover a paper and will continue to send you for the next few weeks a copy of this paper so that you may be advised some as to the conditions prevailing here. I shall also hold one-half of a double house that I am the owner of, for you until I hear whether you purpose accepting my proposition. With kind regards, I am,

"Yours respectfully,

"J. A. MCGOWAN."

"Battle Creek, Apr. 7–10.

"J. O. McGowan,

"Plains, Montana.

"Sir:

"I will accept your proposition as I have been wanting to come west and settle in a small town for some time back. I will do the best I can for you and I think we can get along alright. If you think I had better bring my family when I come, advance me $160, with the privilege of paying it back by the month at legal interest. If I come alone $75 will do. Am ready to come any time. Yours for business,

"C. O. EDWARDS."

Other communications were exchanged, but, while indicating that the employment was for services for the company, none of them wrought any change in the terms of the agreement evidenced by the two letters quoted. On April 27 the plaintiff arrived at Plains and began work on May 1, continuing therein

under the exclusive direction of McGowan, until December 14, 1910. On that day he received the following communication from McGowan, written on a printed letter-head of the First National Bank of Plains:

"Mr. C. O. Edwards,
"Superintendent, Plains Light & Water Co.,
"Plains, Mont.

"Dear Sir:

"For sometime I have been impressed with the advisability of placing the entire management of the Light & Water Co. in your hands. The fact of having two heads is not pleasing or satisfactory to me. From this time on you will take entire charge of our property including the power house and also have jurisdiction over the employees at the power house. If at any time you feel that the interest of the business requires a change you are at liberty to make the same without consulting with me in reference to the matter. Thanking you for the efficient manner in which you have handled our affairs, I beg to remain,

"Yours respectfully,
"J. A. MCGOWAN,
"President."

Thereafter he performed his duties until he was discharged by Mr. Blaisdell, the attorney of the company, on August 31, 1911, previous notice having been given him by Mrs. McGowan, the surviving wife of J. A. McGowan and the executrix of his will. His duties required him to superintend the running of the combined plant, to purchase supplies, to make repairs, to assist in collecting bills from customers and, during a large part of the time, to run the machinery in the power plant. After January 1, 1911, he was not permitted to make purchases without first having the purchasing lists approved by Rittenour, as vice-president, McGowan being then incapacitated by illness from which he subsequently died. Customers of the company who paid their current bills, without solicitation paid them to Johnson at the bank of which he was cashier. Except as here noted, none of the directors or officers of the company had any

connection with the company's business. The by-laws authorized the president to "sign as president all certificates of stock and all contracts and other instruments in writing which have first been approved by the directors."

To the letters quoted in the foregoing statement, considered in the light of the circumstances under which they were written, the purpose in view, and their interpretation by the parties (Rev. Codes, sec. 7877; *Armington* v. *Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115; *Murphy* v. *Stone & Webster Eng. Corp.*, 44 Mont. 146, Ann. Cas. 1913A, 1334, 119 Pac. 717; *Ford* v. *Drake*, 46 Mont. 314, 127 Pac. 1019), we think, cannot be assigned any meaning other than that McGowan intended to employ, and did employ, the plaintiff to serve the defendant as its superintendent, upon the terms and for the period of time [2] specified. It is true that the letters are informal; it is true that his letter to plaintiff was signed by McGowan personally; it is also true that the proposal is stated as that of McGowan himself and that the consideration named was apparently to be paid by him. Yet, the proposition as made and accepted implied previous negotiations and also that the service desired was the superintendence of the plant owned, not by McGowan in person, but by a corporation the stock of which was owned solely by himself. That both understood this to be the situation is rendered certain by the character of the negotiations which contemplated employment by defendant, and by the fact that plaintiff went to Plains from his home in Michigan and immediately entered the service of the defendant under McGowan, without further negotiations or question, and continued therein until his discharge. It thus being clear that the intention of McGowan was to bind the defendant, it became bound (Rev. Codes, sec. 5449), as fully as if he had thereafter executed a formal contract in its name.

Counsel argue that, though all this be accepted as true and though the letters may upon the face constitute such a note [3] or memorandum as will satisfy the requirements of section 5017 of the Revised Codes, the agreement did not become bind-

ing upon the defendant, because McGowan had not been authorized by any act of the board of directors, expressed in writing, to enter into such a contract, as is required by section 5424. From its very nature, a corporation can act only through its officers and agents. These agents, including the officers, can exercise only such powers as are expressly or impliedly granted by its board of directors. It is well settled, however, that when the corporation entrusts to its president the active management of its business, he may bind the corporation by contracts which are within the scope of the powers of the corporation, and which are necessary or proper or usually made in the conduct of its business. (*Trent* v. *Sherlock*, 24 Mont. 255, 61 Pac. 650; *Mathias* v. *White Sul. S. Assn.*, 19 Mont. 359, 48 Pac. 624; *Spelman* v. *Gold Coin M. & M. Co.*, 26 Mont. 76, 91 Am. St. Rep. 402, 55 L. R. A. 640, 66 Pac. 597.) The fact that he is permitted by the board of directors to occupy the position of such an agent, carries with it the implication that he has been clothed by it with all the powers necessary to enable him to carry forward the ordinary business of the corporation; and when, as in this case, the board of directors, the members of which hold all the shares, either by direct action evidenced by a by-law or a resolution, or by continued acquiescence, authorizes or permits the president to exercise all its powers and functions, the board itself remaining entirely inactive, he becomes, for the time being, the board of directors, with all the powers it possesses, and the corporation cannot thereafter question the validity of any act done by him within the scope of its legal powers.

In *Cunningham* v. *German Ins. Bank*, 101 Fed. 977, 41 C. C. A. 609, it was said: "Where the stockholders of a corporation, by their direction or acquiescence, invest the executive officers of the company with the powers and functions of the board of directors as a continuous and permanent arrangement, the board being entirely inactive, and the officers discharging all its duties, a mortgage on the property of the corporation, made and executed in its behalf by such officers, is valid although not authorized by any vote of the stockholders or directors."

The courts have often been called on to consider the validity of acts of the president of a corporation under similar circumstances, and, though expressing the rule in varying terms, generally uphold the doctrine announced by the court in the above quotation. The following cases in principle directly support it: *Buchwald Co.* v. *Hurst*, 111 Md. 572, 75 Atl. 111; *Gilman* v. *Heitman*, 137 Iowa, 336, 113 N. W. 632; *South Florida Citrus L. Co.* v. *Waldin*, 61 Fla. 766, 55 South. 862; *Chestnut St. T. & S. F. Co.* v. *Record Pub. Co.*, 227 Pa. 235, 136 Am. St. Rep. 874, 75 Atl. 1067; *Tyler Estate* v. *Hoffman*, 146 Mo. App. 510, 124 S. W. 535; *Wales-Riggs Plantations* v. *Caston*, 105 Ark. 641, 152 S. W. 282; *Ceeder* v. *H. M. Loud & Sons Lumber Co.*, 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; *National St. Bank* v. *Sandford Fork & Tool Co.*, 157 Ind. 10, 60 N. E. 699; *St. Clair* v. *Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; *Tourtelot* v. *Whithed*, 9 N. D. 467, 84 N. W. 8; see, also, 3 Cook on Corporations, sec. 716; 2 Thompson on Corporations, sec. 1458.

In *Chestnut St. T. & S. F. Co.* v. *Record Pub. Co.*, *supra*, the court ccnsidered the authority of the president of a corporation where the board of directors had been dormant from the time of the organization of the corporation, and had left the conduct of the business exclusively to the president, and tersely stated the rule thus: "Where the stockholders and directors turn over to an officer the full and absolute management of all corporation affairs, and permit him to exercise unrestrained control for a long course of time without instructions from or reference to any other authority, *prima facie* the officer so entrusted may be taken to have power to do any act which the directors could authorize or ratify." And it does not alter the case that the person seeking to charge the corporation did not have knowledge of the manner in which the affairs of the corporation were being conducted. (*First Nat. Bank* v. *Colonial Hotel Co.*, 226 Pa. 292, 75 Atl. 412.)

We think that notwithstanding the provisions of the by-law, apparently giving to the president the power to execute contracts

only upon approval by the board, the rule established by the cases cited is applicable to this case.

The statute (Rev. Codes, sec. 3883) requires that the affairs of the corporation shall be controlled by a board of directors. [4] Section 3836 declares that the directors must perform the duties enjoined upon them by law and the by-laws of the corporation, and that the decisions made by a majority of the board shall be valid as corporate acts. These provisions do not restrict the power of the board to authorize the general executive officer to conduct the business of the corporation under its direction, and the authority to do this may be conferred by specific act or by implication, under the rule stated above, by an acquiescence in his assumption of it. When, as here, the purpose of the organization of the corporation is to serve the business interests of the president himself, and the board is composed of persons who have evidently been selected because they will acquiesce in his complete and exclusive control, and they do acquiesce, then the president is the corporation itself, so far as strangers are concerned, and any act done by him is to all intents and purposes the act of the corporation. The corporate entity, as distinguished from him in his capacity of agent, is to be ignored, and when he executes such a contract as that under consideration here, it must be regarded as much that of the company as if it had been authorized in the most formal manner.

The evidence was amply sufficient to justify the finding of the jury that McGowan had authority to execute the contract.

The next contention is that the court erred in excluding from the evidence the minute-book of the board of directors which was offered for the purpose of showing that the board had never passed a resolution authorizing the president to enter into the contract with the plaintiff. The evidence would not have tended in any way to rebut the evidence introduced by the plaintiff to show authority in McGowan. The theory of plaintiff's counsel was that under the circumstances disclosed, the inquiry whether express authority had been conferred upon McGowan

was wholly immaterial. The court adopted this theory, and we think it was correct.

These remarks dispose of the further contention that the court erred in refusing to instruct the jury that the plaintiff could not recover unless it was shown by a preponderance of the evidence that McGowan had been authorized by the board, in writing, to enter into the contract, or that the board had subsequently ratified the contract in writing. As we have heretofore shown, the act of McGowan was to all intents and purposes the act of the company. The instruction was properly refused because it was inconsistent with the correct theory of the case and would have been tantamount to directing a verdict for the defendant.

Finally, it is contended that the measure of damages submitted in the instructions was erroneous. The court instructed [5] the jury that if they found that the plaintiff was entitled to recover under the law as declared in other instructions, he would be entitled to a verdict for the amount he would have earned under the contract to the end of the term, less any amount he had received for his services rendered to others, or should have received by the exercise of diligence to secure profitable employment after the date of his discharge, and such additional sum as they believed he might have earned by the exercise of due diligence up to the end of the term. The plaintiff brought this action for a breach of the entire contract for services. This he had a right to do; for upon the happening of the breach the wrong done him was complete and he then became entitled to recover in the one action whatever damages flowed from the wrong thus done. His compensation for the breach necessarily included all that he might have recovered had action been deferred until the expiration of the term. His earnings for the entire term were in the direct contemplation of the parties when they made their engagement. He was therefore entitled to have the jury assess the damages for the entire term, even though the trial was had before the expiration of it. And though the amount to be assessed for the unexpired portion of

the term, in this character of cases, is largely a matter of speculation, nevertheless the difficulty encountered in ascertaining it is not greater than in other cases, especially in personal injury cases, and the amount recoverable must be determined in view of all the circumstances disclosed by the evidence in the one case as well as in the other.

There is some conflict in the adjudicated cases upon the subject. In Wisconsin it is held that recovery may be had only for the compensation stipulated for in the contract, up to the time of trial, less any wages the plaintiff may by reasonable diligence have earned in the meantime. (*Gordon* v. *Brewster*, 7 Wis. 309.) In Minnesota it is held that where the compensation is payable in installments, an action may be brought to recover each installment when it falls due, the failure to pay it when due constituting a separate and distinct breach of the contract. (*McMullan* v. *Dickinson Co.*, 60 Minn. 156, 51 Am. St. Rep. 511, 27 L. R. A. 409, 62 N. W. 120.) The better reasoning and, we think, the weight of authority support the rule adopted by the trial court. (3 Sutherland on Damages, 3d ed., sec. 692; Labatt's Master & Servant, sec. 347; *Dennis* v. *Maxfield*, 10 Allen (Mass.), 138; *Blair* v. *Laflin*, 127 Mass. 518; *Pierce* v. *Tennessee Coal, Iron & R. R. Co.*, 173 U. S. 1, 43 L. Ed. 591, 19 Sup. Ct. Rep. 335; *East Tennessee etc. R. Co.* v. *Staub*, 7 Lea (Tenn.), 397; *Remelee* v. *Hall*, 31 Vt. 582, 76 Am. Dec. 140; *Sutherland* v. *Wyer*, 67 Me. 64; *Chamberlin* v. *Morgan*, 68 Pa. 168.) Under this rule, contrary to the contention of counsel, a plaintiff may recover nothing more than was fairly within the contemplation of the parties when the contract was made, and the judgment concludes him from bringing action to recover anything else in the future.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY, being absent, takes no part in the foregoing decision.

DUBBELS, APPELLANT, *v.* THOMPSON, RESPONDENT.

(No. 3,478.)

(Submitted September 21, 1914. Decided November 5, 1914.)

[143 Pac. 986.]

Mortgages—Real Property—Conveyance by Mortgagor to Mortgagee—Effect—Extinguishment of Lien—Title—Estoppel—Burden of Proof—Fraudulent Conveyances.

Real Estate—Mortgages—Conveyance by Mortgagor to Mortgagee—Effect.

1. As between the parties to a real estate mortgage, a deed to the property by the mortgagor to the mortgagee does not of itself extinguish the lien, the result of such a transaction depending upon the intention with which it was made, which may be shown by the recitals in the instrument or by a separate agreement in writing, or may be ascertained from parol evidence of the circumstances accompanying the transaction.

[As to the maxim "Once a mortgage always a mortgage," see note in 131 Am. St. Rep. 914.]

Same—Extinguishment of Lien—Statutes.

2. *Semble:* It would seem from the language of section 5727, Rev. Codes, that in order to be effective to extinguish a mortgage lien through the agency of a sale of the property to the mortgagee, it must be made for that purpose and the conveyance must disclose such fact.

[As to validity of agreement by mortgagor, to convey premises to mortgagee in consideration of release from liability under mortgage, see note in Ann. Cas. 1913C, 1243; Ann. Cas. 1914C, 926.]

Same—Conveyance of Property to Mortgagee—Duty of Purchaser from Latter.

3. Where title to realty is acquired by deed from a mortgagor to the mortgagee, not expressing the purpose of it, the person taking from the latter is bound at his peril to ascertain whether the conveyance from the mortgagor to the mortgagee was intended as a final adjustment of their rights.

Same—Conveyances—Title—Estoppel.

4. Where a mortgagee by warranty deed mistakenly reconveyed to the mortgagor the mortgaged property after transfer to him by the latter, thus enabling his grantee to convey title to a third person, he was estopped to assert that such third person was bound at his peril to ascertain whether his mortgage lien had been extinguished.

[As to revival of mortgage when satisfied by mistake, see note in 5 Am. St. Rep. 703.]

Same—Deeds—Validity—Burden of Proof.

5. One who attacks the validity of a duly executed deed has the burden of proof.

Same—Fraudulent Conveyances—Burden of Proof.

6. T. executed to D. a mortgage upon real property. On default of payment of the note to secure which it was given, T. by warranty deed transferred the property to D., who did not formally release the mortgage. D. later mistakenly reconveyed to T., who knew nothing of this conveyance until delivery of it to him by the clerk

after recording. T. thereafter transferred to his father, a nonresident, who was not shown to have had any knowledge of the transfer to him. In a suit by D. to foreclose the mortgage, evidence *held* to disclose that the latter transaction was fictitious, and that in the absence of any evidence on the part of T.'s father in explanation of it, a judgment in his favor was erroneous.

Appeal from District Court, Musselshell County; Charles L. Crum, Judge.

ACTION by John Dubbels against Carl N. Thompson and others. From a judgment in favor of defendant K. Thompson and an order denying him a new trial, plaintiff appeals. Reversed and remanded.

Messrs. Boarman & Boarman, for Appellant, and *Mr. Henry C. Smith*, of Counsel, submitted a brief; *Mr. Smith* argued the cause orally.

Mr. Thomas J. Mathews, for Respondent, submitted a brief and argued the cause orally; *Mr. Carl N. Thompson*, of Counsel.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to obtain foreclosure of a mortgage upon a lot and the buildings thereon, situate at Roundup, in Musselshell county, executed to plaintiff by defendants Carl N. Thompson and his wife, Ida M. Thompson, to secure the payment of a promissory note for $700. The note was executed by Carl N. Thompson on March 1, 1910, and was payable at the end of one year, with interest at eight per cent per annum. The mortgage was executed on June 10 following and was recorded August 5. Default having been made in the payment of the note, on April 18, 1912, Carl N. Thompson and wife executed and delivered to plaintiff their warranty deed conveying to him the mortgaged property. The consideration mentioned in this deed was $825.55, the amount of the note. It was recorded two days later. The mortgage was not formally released. On July

1 the plaintiff and his wife executed to defendant Carl N. Thompson and his wife their warranty deed conveying the property to them. This deed was mailed by plaintiff to the county clerk of Musselshell county, with the request that the clerk record it and deliver it to Thompson, which he did. It was filed for record on July 6, at 9:05 A. M. The consideration named was the same as that named in the other deed. The first knowledge Thompson and his wife had of this deed was its delivery to them by the clerk. When the delivery was made does not appear. On July 8 Thompson and his wife conveyed the property by warranty deed to K. Thompson for an ostensible consideration of $1,300 in cash. This deed was put on record on July 18, and prior to the commencement of this action. The complaint alleges that defendants K. Thompson and Weaver claim some interest in the property, but that such interest, if any they have, is subject to the lien of plaintiff's mortgage. There is in the record what purports to be the separate answer of defendant K. Thompson, in which it is alleged that he became the purchaser of the property under the deed executed to him by Carl N. Thompson and his wife on July 8, 1912, paying therefor the consideration named, without notice that plaintiff had or claimed any interest therein, after he had procured an abstract of the title and had ascertained that the mortgage given to plaintiff by Carl N. Thompson had been discharged. Weaver filed a joint answer with Carl Thompson and Ida, his wife, but claimed no interest in the property. The trial court determined the plaintiff was not entitled to any relief and dismissed the action as to K. Thompson. It granted plaintiff a personal judgment against defendant Carl N. Thompson for the amount of the note with interest and costs. The plaintiff has appealed from the judgment and order denying his motion for a new trial.

There was no conflict in the evidence. In addition to a disclosure of the conveyances in the order in which they were made, as stated above, these facts appear: Carl N. Thompson is an attorney at law and resides at Roundup. The plaintiff resides at Guttenberg, Iowa. K. Thompson resides at Sioux Falls, South

Dakota. The deed to plaintiff by Thompson and wife was not made for the purpose of discharging the mortgage indebtedness, nor was it accepted for that purpose. It was intended to save the expense of foreclosure in case payment should not be made by Thompson on or before the expiration of a year from the date of it, the real consideration being an extension of time for the payment of Thompson's note for one year. At the time it was executed, it was understood that plaintiff should execute an agreement in writing under the terms of which the time of payment was to be extended for one year, whereupon, if payment should be made, he would reconvey the property to Thompson. The agreement was not executed by the plaintiff, but he retained the note. The plaintiff testified that he consented to the arrangement, upon the condition that Thompson would turn over to him all rent earned by the property from and after May 1, 1912, assign to him the insurance upon it, and secure the release of a second mortgage held upon the property by Weaver, but that Thompson failed to comply with these conditions. At that time plaintiff was visiting Roundup. After the deed was delivered to him he personally delivered it to the clerk for record. On June 10, 1912, he wrote Thompson, pressing for payment on or before the end of June and threatening foreclosure of the mortgage, assigning as his reason that Thomspon had not complied with the conditions upon which the agreement for an extension of time had been made and therefore was not entitled to delay payment further. On June 12 Thompson replied, stating in substance that he was doing his best to meet his obligations to plaintiff and other creditors, but that so far he had not been able to meet them, and that he would have to let plaintiff pursue his own course. Plaintiff thereupon, to clear the record, as he says, so that it might not appear as though he was trying to foreclose a mortgage upon his own property, and as a preliminary step to the institution of this action, executed and delivered the deed dated July 1, as heretofore stated, without consideration, and for no other purpose. On May 5, 1911, Carl N. Thompson mailed to plaintiff his check upon a bank at Roundup

for $761 as payment in full of the note. This check was presented to the bank for payment on September 26 following, but was refused on "account insufficient funds." Although it was not paid, plaintiff retained it in his possession and produced it at the trial. It incidentally appears that K. Thompson is the father of Carl N. Thompson. The separate answer purporting to be his was verified by Carl N. Thompson, who appeared as his counsel. He did not appear at the trial nor was his deposition taken, it appearing from a statement made by his counsel during the trial that he had been unable to obtain the deposition.

As between the plaintiff and defendant Carl N. Thompson, the deed dated April 18, 1912, under the facts disclosed, did not [1] extinguish the mortgage. It is a well-settled rule that as between the parties, the result of such a transaction depends upon the intention which prompts it. This intention may be shown by the recitals in the deed itself, or by a separate agreement in writing, or it may be ascertained from parol evidence of the circumstances accompanying the transaction—such as that the mortgagee retains the evidences of the debt, having accepted the deed as additional security, or that he does not formally release the mortgage, or assigns it to a *bona fide* purchaser, representing that it is a valid, subsisting security. (*Gibson* v. *Morris State Bank*, 49 Mont. 60, 140 Pac. 76; *Factors & Traders' Ins. Co.* v. *Murphy*, 111 U. S. 738, 28 L. Ed. 582, 4 Sup. Ct. Rep. 679; *Worcester Nat. Bank* v. *Cheeney*, 87 Ill. 602; *McCrory* v. *Little*, 136 Ind. 86, 35 N. E. 836; *Gray* v. *Nelson*, 77 Iowa, 63, 41 N. W. 566; Warvelle on Abstracts, sec. 347; Jones on Mortgages, sec. 848.)

Counsel for the plaintiff argue that the uncanceled mortgage upon the record was sufficient notice to put K. Thompson on inquiry, and hence that when he accepted the deed from Carl N. Thompson he had notice that plaintiff's mortgage lien had not been extinguished. But for the subsequent deed from plaintiff and his wife to Carl N. Thompson and his wife, the argument would be plausible. Section 5727 of the Revised Codes declares: [2] "The sale of any property on which there is a lien, in satis-

faction of the claim secured thereby * * * extinguishes the lien thereon." Upon the face of it, the meaning of this section seems to be that, in order to be effective to extinguish the lien of the mortgage, a sale by the mortgagor to the mortgagee must be for that purpose, and that the evidence of the sale—the conveyance—must disclose the fact. The sale must be "in satisfaction of the claim secured" by the lien. This notion is supported somewhat by the fact that in sections 5752 and 5753 we find prescribed specific methods by which the lien may be discharged.

Under section 5752 this may be accomplished by an entry on the margin of the record by the mortgagee, or his personal representative or assignee, over his signature made in the presence of the clerk and witnessed by him. Under section 5753 the satisfaction may be entered by the clerk upon his receipt of the certificate therein described, which, under the following section, he must then record at length. In either case the discharge is effective. If this is the theory of section 5727, then it would seem to have been the purpose of the legislature in enacting it to leave open to inquiry the status of the mortgage lien in every case in which the evidence of the sale does not express upon its face the intention of it. Upon this assumption, a deed from the [3] mortgagor to the mortgagee not expressing the purpose of it leaves the record equivocal in meaning, and persons taking the title from the mortgagee are bound at their peril to ascertain by inquiry whether the conveyance was intended as a final adjustment of the rights of the parties. The case of *Swain* v. *McMillan*, 30 Mont. 433, 76 Pac. 943, cited by counsel for respondent as conclusive of the question suggested by the argument of counsel for the plaintiff, is not in point; nor is it necessary for us to decide definitely in this case the question presented. By their deed to Carl N. Thompson and wife, the plaintiff and his wife solemnly declared to all the world that they had vested their grantees with a clear title, free from any lawful claim not only by themselves but by any other person whomsoever. (Rev. Codes, sec. 4621.) And though plaintiff's undoubted purpose was to clear the title so that he could—as he erroneously supposed—

[4] more conveniently foreclose his lien, he cannot now say that anyone acquiring title from the mortgagor was bound at his peril to ascertain that his lien had been extinguished. To permit him to do this would be to permit him to allege his own negligence as a ground for relief. This he cannot do. (*Fredericks* v. *Davis*, 3 Mont. 251.)

The conduct of Carl N. Thompson was indefensible from any point of view and merits condemnation; for though it be assumed [5, 6] that K. Thompson was entirely innocent of wrong and acquired the title in the utmost good faith, paying the consideration mentioned in the deed, manifestly the purpose of Carl N. Thompson was to defeat the plaintiff in his effort to recover the money due him. The act of the plaintiff, though the result of ignorance or inexcusable carelessness, furnished no justification or excuse. We are thus brought to a consideration of the question whether, from any point of view, the facts disclose a case upon which plaintiff is entitled to relief. Carl N. Thompson was in financial straits. Though doubtless surprised by the receipt of plaintiff's deed from the clerk, he must at once have conceived the plan to defeat the foreclosure proceeding which the plaintiff had foreshadowed in his letter of June 10, 1912. Within the two following days the plan was carried out. During that brief period of time he made the contract of sale to his father, who resided nearly a thousand miles away, after the latter had determined to purchase the property and had procured an abstract of title to ascertain whether it was free from encumbrance. There is no suggestion in the evidence that the father was in Roundup at that time or ever had been there. If he was and had no notice of the purpose of his son, he was grossly deceived by the son. If he knew the situation, then we have the spectacle of the father joining with the son in the perpetration of a fraud. If he was not in Roundup, we must accept the improbable—nay, the impossible—as a fact, *viz.*, that the contract was made by mail or telegram, that the abstract was obtained, and the deed executed and delivered, within the time intervening between 9:05 o'clock on July 6 and sometime

during the day of July 8. That it was not delivered to the clerk for the father after filing and record is clearly inferable from the fact that while it was acknowledged before the clerk on July 8, it was not filed for record until July 18. The answer of K. Thompson was prepared and verified by Carl N. Thompson. K. Thompson was not present at the trial. Only incidentally did it appear that there is such a person. Being asked on his examination whether he knew the Thompsons, father and son, the plaintiff, after stating that he knew Carl N. Thompson, said: "I never saw K. Thompson, his father." This is the only reference to him by name in the record, except that Mr. Mathews, who was associated with Carl N. Thompson, as counsel, as an explanation of his offer in evidence of the record of the deed instead of the original, said: "This deed is in the possession of K. Thompson * * * and had we been able to get his deposition, the deed would have been produced here." It appears incidentally from the record that there had been ample opportunity to secure the deposition of K. Thompson. Carl N. Thompson, through counsel of record and present at the trial, maintained silence throughout, and did not even claim or attempt to show that the mortgage debt had been paid. As between the parties or their successors in interest by a subsequent title, the recitals in a written instrument are conclusively presumed to be true, except the recital of a consideration (Rev. Codes, sec. 7961); and as to a consideration, the recital is deemed *prima facie* to be true (sec. 7962). A deed duly executed is presumed to have been delivered at its date (sec. 4597.) One who attacks the validity of such an instrument must sustain the burden of proof. (*Hull* v. *Diehl,* 21 Mont. 71, 52 Pac. 782.) While, therefore, upon the assumption that K. Thompson was in fact a purchaser from Carl N. Thompson as the deed on its face shows, the evidence is insufficient to warrant the conclusion that K. Thompson had knowledge of the purpose of Carl N. Thompson, we think it sufficient to support an inference that the transaction was wholly fictitious; that K. Thompson knew nothing of it, and that it ought to be overturned for that reason. In

any event, it is sufficient to call for explanation by this defendant as to whether in fact it took place as Carl N. Thompson claims.

Ordinarily, in such a case as this, we would order the district court to set aside the judgment and enter a decree for plaintiff. Under the peculiar circumstances disclosed by the record, however, we deem it the better and safer course to direct a new trial. Accordingly, the judgment and order are reversed and the district court is directed to award the plaintiff a new trial.

Reversed and remanded.

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY, being absent, takes no part in the foregoing decision.

STATE, RESPONDENT, *v.* DRISCOLL, SHERIFF, APPELLANT.

(No. 3,569.)

(Submitted October 27, 1914. Decided November 6, 1914.)

[144 Pac. 153.]

Officers — Sheriffs — Removal—Neglect of Duty—Accusation—Sufficiency — Justification — Matter of Defense — Trial by Court—Evidence—Erroneous Admission—Harmless Error—Presumptions.

Sheriffs—Removal—Neglect of Duty—Accusation—Sufficiency.

1. An accusation looking to the removal of a sheriff from office because of neglect of official duty—an offense public in its nature under section 8107, Rev. Codes—which was entitled in the name of the state "on the accusation" of certain persons, was sufficient in form, where from the whole body of the document it was apparent that a public proceeding and not a private action was initiated by it.

[As to liability of sheriffs for misperformance and nonperformance of official duties, see note in 95 Am. St. Rep. 96. As to failure to enforce laws as ground for removal of public officer, see note in Ann. Cas. 1913D, 32.]

Same—Accusation—Contents.

2. An accusation of the character of the above need not allege that the accuser is an elector of the county in which accused holds office.

Same—Accusation—Sufficiency.

3. To charge the existence of a riot for failure to suppress which defendant sheriff was sought to be removed from office, it was not

necessary to employ the language of section 8565, Revised Codes, defining a riot; a statement of facts from which its existence was inferable being sufficient.

Same—Accusation—Sufficiency.

4. The accusation above referred to was not rendered objectionable because specific crimes therein mentioned as having been committed during the riot were not described with the particularity required in an indictment or information against the perpetrators thereof, their commission having been incidental only and in nowise affecting the duty of the sheriff in the premises.

Same—Accusation—Justification—Matter of Defense.

5. Circumstances tending to justify or excuse the conduct of accused for which he was sought to be removed from office were matters of defense, which it was not necessary to anticipate in the accusation.

Same—Accusation—Verbal Misprision—Immateriality.

6. Where it was fairly deducible from a paragraph of an accusation charging official delinquency on the part of a sheriff that it was intended to allege that the accused had failed to serve bench warrants issued out of the district court in the regular way upon the order of the judge, a verbal misprision to the effect that they were issued by the judge instead of by the clerk, may not be held to have rendered that portion of the accusation valueless.

Trial by Court—Evidence—Erroneous Admission—Presumptions.

7. Where a trial is had by the court without the aid of a jury, the presumption obtains that, if incompetent testimony was admitted, it was disregarded by the court in arriving at its conclusion.

Appeal from District Court, Silver Bow County; Roy E. Ayres, Judge of the Tenth Judicial District, presiding.

PROCEEDING by the state, on the accusation of James H. Rowe, Louis Dreibelbis, W. M. Tuohy and A. R. Currie, to remove Tim Driscoll from the office of sheriff of Silver Bow county. From a judgment of removal and from an order denying him a new trial, defendant appeals. Affirmed.

Mr. J. E. Healy and *Messrs. Walker & Walker*, for Appellant, submitted a brief; *Mr. Frank Walker* argued the cause orally.

Messrs. Peter Breen and *J. J. McCaffery*, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On the 10th day of September, 1914, an accusation in writing was filed in the district court of Silver Bow county by James H. Rowe and three other persons, alleging that Timothy Driscoll, the sheriff of said county, had refused and neglected to perform

the official duties of his office, and praying for his removal on account thereof. A citation having been issued and served, Mr. Driscoll appeared and by his attorneys moved to quash the citation, and also demurred to the accusation on various grounds, which motion and demurrer being overruled, he made answer denying the material averments of the accusation. Thereafter the cause came on for trial before the court sitting without a jury, Honorable Roy E. Ayres presiding, and the court, after hearing the evidence offered both in support of and against the accusation, found Mr. Driscoll to be guilty and entered judgment depriving him of his office and declaring said office to be vacant. A motion for new trial was made and denied. Whereupon Mr. Driscoll appealed to this court asking that said cause, on account of the public character thereof, be accorded prompt hearing and determination.

As grounds of reversal it is urged that the accusation is insufficient in form and substance, and that the findings and judgment are not warranted by the evidence.

1. (a) The first attack upon the accusation is that since the [1] official neglect sought to be charged is a public offense (sec. 8107, Rev. Codes), and since the present proceeding is a prosecution therefor, it must be conducted in the name and by the authority of the state. (Constitution, Art. VIII, sec. 27.) Assuming this to be true, we fail to observe any substantial departure from the requirements stated. The proceeding is entitled in the name of the state of Montana, and that fact is not avoided because the title also reveals the names of the accusers. From the whole body of the accusation it is apparent that it inaugurates, not a private action, but a public proceeding authorized by both the Constitution (Art. V, sec. 18) and the Codes (sec. 9006). It was prosecuted in a court of general jurisdiction and the name of the county attorney of Silver Bow county appears as counsel for such prosecution.

(b) Fault is found with the accusation because it does not [2] allege the accusers to be electors of Silver Bow county. By the constitutional provision above referred to (sec. 18, Art.

V), a sheriff guilty of misconduct or malfeasance is made removable from office "in such manner as may be provided by law." One of the methods provided by law is a summary proceeding like the present, initiated upon a written accusation verified by the oath of "any person." (Rev. Codes, sec. 9006; *State ex rel. Rowe* v. *District Court*, 44 Mont. 318, 323, Ann. Cas. 1913B, 396, 119 Pac. 1103.) If the meaning of this language could be restricted to the electorate, it could as well be restricted to that portion of the electorate who participated in the election of the officer whose conduct is in question, or even to that portion of the electorate by whose suffrages he had become such officer. We know of no canon of construction nor any consideration of public policy to warrant any such conclusion.

(c) The principal ground of complaint, however, is that the accusation does not state facts sufficient to constitute a public offense. The substance of the allegations upon which findings appear to have been based is as follows:

"5. That on the 13th day of June, 1914, large numbers of persons, many of them bearing arms, were unlawfully and riotously assembled on the principal streets of the city of Butte, particularly on Main, Broadway and Park streets, in said county of Silver Bow, Montana, and that the said Tim Driscoll at said time was advised of the fact that said persons were unlawfully and riotously assembled, and that they were engaged in riotous conduct, and were destroying property and assaulting residents of Silver Bow county; and that in said riot that building known as Miners' Union Hall, in Butte, Silver Bow county, Montana, was wrecked and the furniture and other property contained therein was wrongfully and unlawfully destroyed at the hands of the said riotous assembly; and that certain safe, belonging to Butte Miners' Union No. 1, Western Federation of Miners, was wrongfully and unlawfully removed from said hall to the outskirts of the city of Butte, in Silver Bow county, Montana, in the presence of said Tim Driscoll, while acting as sheriff, and was wrongfully and unlawfully, at the hands of said riotous assembly, broken open by explosives, and the con-

tents thereof, consisting of money to the amount of over one thousand dollars, and other valuable property, were feloniously stolen and carried away by persons constituting a part of said riotous assembly, and that though said riotous assembly continued in the acts above mentioned for a period of more than eight hours, the said Tim Driscoll did not go among the persons assembled, or as near them as possible, and command them, in the name of the state, to immediately disperse, nor did he make any arrests, or offer any physical resistance to the said acts of said riotous assembly, hereinbefore mentioned.

"7. That on the 23d day of June, 1914, large numbers of persons, many of them bearing arms, were unlawfully and riotously assembled on Main street, within the limits of the city of Butte, Silver Bow county, Montana, and that the said Tim Driscoll at said time was advised of the fact that said persons were unlawfully and riotously assembled, and that they were engaged in riotous conduct, destroying property, discharging firearms and explosives, and committing robbery, and that in said riot, and as a result thereof, one man, to-wit, Ernest J. Noy, was shot and killed and two others were wounded, and that the building known as the Butte Miners' Union Hall, and other property in the neighborhood of said hall and within said county of Silver Bow, was wrongfully and unlawfully destroyed by explosives at the hands of said riotous assembly, and that though the said Tim Driscoll, as sheriff of Silver Bow county, Montana, was advised of said riotous assembly and their conduct, as hereinbefore set forth, he, the said Tim Driscoll, did not go among the persons assembled, or as near them as possible, and command them, in the name of the state, to immediately disperse and did not arrest or apprehend any of the parties participating in said riots or robbery, although the said rioters and unlawful acts continued during a period of more than five hours.

"8. That on the 27th day of August, 1914, in the city of Butte, said county of Silver Bow, a large number of persons, armed and unarmed, were unlawfully and riotously assembled

in said county of Silver Bow aforesaid, and that certain persons, so unlawfully and riotously assembled, did then and there, by force, seize, take and have in their custody Pat Towey, Martin Harkins and Martin Glackin and many other persons, all residents of the city of Butte, in the county of Silver Bow, State of Montana; that the said persons did then and there, by force and violence, unlawfully and wrongfully detain said persons and require them to march through the streets of the said city of Butte to a vacant lot within the limits of said city, and near the center of said city of Butte, and then and there forcibly, unlawfully and wrongfully hold and detain said persons, and did then and there conduct publicly, and in the presence of said sheriff, an alleged trial of said persons before the members of the Butte Mine Workers Union and other persons, so unlawfully and riotously assembled, and did then and there in the presence of said Tim Driscoll, forcibly, violently, wrongfully and unlawfully cause the said Pat Towey, Martin Harkins and Martin Glackin, to be kidnaped, driven and deported from the city of Butte, and did then and there advise and require the said Towey, Harkins and Glackin never again to return to the city of Butte, and state that if they did "they would get the rope," meaning thereby that they would be hanged. That though the said Tim Driscoll, as sheriff of said Silver Bow county, Montana, was then and there, and ever since has been, advised of said unlawful and riotous assembly last mentioned, and was present at said time when the said Towey, Harkins and Glackin were being unlawfully held and detained, he, the said Tim Driscoll, failed, neglected and refused to perform his official duty as sheriff, and he failed, neglected and refused to rescue the said Towey, Harkins and Glackin, or to take any action whatsoever in their behalf, or to make any arrests on account of their unlawful detention, and the said Tim Driscoll failed, neglected and refused to go among said persons assembled, or as near them as possible, or to command them, in the name of the state, to immediately disperse and that he has, ever since the said 27th day of August, 1914, failed, neglected and refused to

cause the arrest and punishment of any of the persons engaged in such unlawful conduct.

"10. That on or about the 29th day of August, 1914, informations were filed in the district court of the second judicial district of the state of Montana, charging Michael McDonald, J. E. Bradley, Joe Shannon, James Chapman and William O'Brien with a felony, to-wit, kidnaping; that on said date bench warrants for the arrest of the said Michael McDonald, J. E. Bradley, Joe Shannon, James Chapman and William O'Brien were duly issued by the judge of said court and placed in the hands of said Tim Driscoll, as such sheriff, for service; that the said Tim Driscoll failed and neglected to serve said warrants or any of them, or to arrest the said Michael McDonald, J. E. Bradley, Joe Shannon, James Chapman and William O'Brien or either of them, each and all of which persons were, at the time of the receipt of said warrants by said sheriff, and for several days thereafter, openly about the streets and other public places in the city of Butte, and their whereabouts known to said sheriff, and though the said Michael McDonald did openly and publicly, at a mass meeting in the streets of the city of Butte, Silver Bow county, Montana, defy the said sheriff to arrest him, and openly declared that he would kill the first man who laid hands on him to place him under arrest; that the said Tim Driscoll, though fully advised of the conduct and actions of the said Michael McDonald, above mentioned, did not arrest or attempt to arrest or cause the arrest of the said Michael McDonald."

To each of the foregoing paragraphs special and particular objections are made, the general character of which may be illustrated by those addressed to paragraph 5: It is argued that this paragraph is valueless because "the material allegations which our statute says go to make a riot are not set forth"; because "complainants merely allege that the safe was wrongfully and unlawfully broken open by explosives, which is not an allegation of any crime having been committed but is consonant with law and order so far as criminal intent is con-

cerned"; because it is not alleged that the appellant "had opportunity, after being advised, to present himself at the scene of trouble and either quell the disturbance and compel the crowd to disperse or * * * that he had the physical power to quell the riotous assembly"; and because it is not alleged that the appellant had knowledge of the fact that property was being stolen by the persons constituting part of the riotous assembly or that he was present thereat or had the physical power to prevent it.

These criticisms are unavailing. Our statute defines riot to [3, 4] be "any use of force or violence, disturbing the public peace, or any threats to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law." (Rev. Codes, sec. 8565.) If we grant that in charging the sheriff with a neglect of his duty to suppress a riot or to arrest rioters, the existence of the riot cannot be averred in general terms but that the constituents thereof must be set forth, it does not follow that this must be done in the language of the statute. If the facts are alleged which show the existence of a riot, it is enough and it would be ridiculous to say that the existence of a riot is not alleged when it is specifically stated that "large numbers of persons, many of them bearing arms, were unlawfully and riotously assembled on the principal streets of the city of Butte, * * * destroying property and assaulting residents." So, too, the fact that in the course of such a riot other specific crimes were committed is incidental; it in nowise affects the duty of the sheriff to suppress the riot, and failure to describe such crimes with the particularity requisite in an indictment or information against the perpetrators thereof cannot be of vital consequence to this accusation.

A riot existing to the knowledge of the sheriff, it becomes his duty to suppress it (Rev. Codes, sec. 3010); he must command the rioters to disperse (Rev. Codes, sec. 8962); he must arrest them if they do not disperse, and for that purpose he may command the aid of all persons present or within the

county (Rev. Codes, sec. 8963). The duty thus imposed is absolute, and to charge that the riotous assembly occurred with the knowledge of the sheriff, that it continued for eight hours, that it was accompanied by disorder and destruction of property, that it was not dispersed, that participants therein were not arrested, and that no physical resistance was offered to its acts, is to charge official delinquency upon the part of that [5] officer; and any circumstances there might be tending to justify or excuse his conduct are matters of defense which need not be anticipated in the accusation. Such, in principle, at least, is the effect of the following cases: *State ex rel. Rowe* v. *District Court, supra; State ex rel. Ryan* v. *Board of Aldermen*, 45 Mont. 188, 122 Pac. 569; *People ex rel. Eakins* v. *Roosevelt*, 44 N. Y. Supp. 1003; *Coffey* v. *Superior Court*, 147 Cal. 525, 82 Pac. 75; *Moulton* v. *Scully* (Me.), 89 Atl. 944; *Scougale* v. *Sweet*, 124 Mich. 311, 82 N. W. 1061.

The same general considerations are applicable to the objections made to paragraphs 7 and 8. As to paragraph 10, it is [6] specifically urged that no duty devolved upon the sheriff to serve the bench warrants, because it is alleged that they were issued by the judge of the district court instead of by the clerk. This is clearly a verbal misprision. From the whole paragraph it is fairly deducible that the bench warrants were issued out of the court in the regular way upon the order of the judge and that it was the duty of the sheriff to serve them. But even if we grant this paragraph to be valueless, enough remains in the accusation to justify the putting of the appellant upon his trial.

2. The district court adjudged the appellant to be guilty, specifically finding the allegations of paragraphs 5, 7, 8 and 10 to have been sustained by the evidence beyond a reasonable doubt. We need not enter into a discussion of this evidence. Suffice it to say that we have read it all and it justifies the court's conclusions. Neither cowardice nor self-interest on the part of the appellant are shown; but there is shown such a degree of inadequacy, such a lack of preparation, such an indisposi-

tion to resort to any effective means for the discharge of his obvious duty in the premises as to amount to official incompetency and neglect.

Complaint is made that the trial court heard incompetent [7] evidence. Whether the testimony referred to was incompetent or not, we are not required to decide. The presumption is that if it was incompetent, the trial court who heard the case without a jury eliminated such testimony from its consideration. (*Finlen* v. *Heinze*, 28 Mont. 548, 73 Pac. 123; *Lane* v. *Bailey*, 29 Mont. 548, 556, 75 Pac. 191.)

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY, being absent, did not hear the argument, and takes no part in the foregoing decision.

PRUDENTIAL SECURITIES CO., RESPONDENT, *v.* THREE FORKS, H. & M. VALLEY R. CO., APPELLANT.

(No. 3,444.)

(Submitted September 19, 1914. Decided November 8, 1914.)

[144 Pac. 158.]

Receivers—Improper Appointment—Corporations—Trust Fund Doctrine.

Receivers—Appointment—Insufficient Showing.

1. Receivership is an extraordinary remedy, never to be allowed except upon a showing that it is necessary; and such a showing was not made by mere insolvency, nor by conduct on defendant company's part the result of which might be a forfeiture of its corporate rights.

[As to when it is proper to have a receiver appointed, see note in 72 Am. St. Rep. 29.]

Corporations—How not Dissolved.

2. A corporation does not cease to exist, nor are its corporate rights forfeited automatically, because of the occurrence of a cause of dissolution or forfeiture.

Receivers—Improper Appointment—Attachment—Execution.

3. The complaint alleged that plaintiff's claim was less than $2,500 and that defendant company's property was worth about $40,000, against which liens were filed to the amount of about $30,000 more than a year before the commencement of this action; there was no allegation that any suits had been brought to enforce such liens. *Held*, a receiver was improperly appointed under the rule that a receivership is not allowed where the party asking for it has or may have an attachment or execution.

[As to when and at whose instance a receiver may be appointed for a corporation, see notes in 72 Am. St. Rep. 39, 70; 118 Am. St. Rep. 198.]

Corporations—Trust Fund Doctrine.

4. The doctrine that the property of a corporation is a trust fund for the benefit of all its creditors, no one of whom is permitted to secure a preference, does not prevail in Montana.

[As to a corporation's right to make preference in favor of a creditor, see notes in 42 Am. St. Rep. 767; 45 Am. St. Rep. 826.]

Appeal from District Court, Gallatin County; Ben B. Law, Judge.

ACTION by the Prudential Securities Company against the Three Forks, Helena & Madison Valley Railroad Company. From an order denying defendant's motion to vacate a receivership, it appeals. Reversed.

Messrs. Hartman & Hartman, for Appellant, submitted a brief; *Mr. Walter E. Hartman* argued the cause orally.

Mr. John A. Luce and *Mr. E. W. Wullenwaber,* for Respondent, submitted a brief; *Mr. Luce* argued the cause orally.

The sole question before the court is: Did the judge of the district court abuse his discretion by continuing the receiver upon the facts shown at the hearing? The application to vacate or revoke the order of appointment of a receiver is addressed to the sound discretion of the court. (34 Cyc. 160 (b); High on Receivers, 4th ed., sec. 25.) Every presumption is in favor of the validity of the order of the lower court, and this court will not be justified in disturbing its order upon the evidence, unless it is clearly shown that only a question of law is presented. (*Chicago & S. E. Ry. Co.* v. *Kenney,* 159 Ind. 72, 62 N. E. 26.) The court will not weigh the evidence on appeal. (*Sheridan Brick Works* v. *Marion Trust Co.,* 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666.)

It has repeatedly been held that the capital and assets of a corporation constitute a trust fund for the benefit of creditors which neither the officers nor stockholders can divert or waste. One of the clearest statements of the extent of this trust and just what the creditors' lien consists of was given in *Ford* v. *Plankington Bank*, 87 Wis. 363, 58 N. W. 766. The same doctrine was announced in *Marr* v. *Bank of West Tennessee*, 4 Cold. (Tenn.) 471. (See, also, 10 Cyc. 653; *Wood* v. *Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944; *Sawyer* v. *Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Sanger* v. *Upton*, 91 U. S. 56, 23 L. Ed. 220; *Washington Liquor Co.* v. *Alladio Cafe Co.*, 28 Wash. 176, 68 Pac. 444; *Holshouser* v. *Gold Hill Copper Co.*, 138 N. C. 248, 70 L. R. A. 183, 50 S. E. 650; *Hightower* v. *Thornton*, 8 Ga. 486.)

There is no doubt of the authority to appoint the receiver, under the facts of this case. The fact that the plaintiff has not recovered judgment is not a valid objection to his right to apply for the enforcement of the general equity in behalf of all the creditors. (*Jones* v. *Mutual Fidelity Co.*, 123 Fed. 506; *Bank of St. Marys* v. *St. John*, 25 Ala. 566; *Conro* v. *Gray*, 4 How. Pr. 166; 2 Morawetz on Private Corp., secs. 797, 798, 897; *St. Louis & Sandaval Coal & Min. Co.* v. *Edwards*, 103 Ill. 472; *Sanger* v. *Upton*, 91 U. S. 60, 23 L. Ed. 220; *Holt* v. *Bancroft*, 30 Ala. 193; *Case* v. *Beauregard*, 101 U. S. 688, 25 L. Ed. 1004.) In Indiana the statute is quite similar to ours, and in a suit by a creditor upon promissory notes, a receiver was appointed in a case no stronger than the case at bar, in *Sheridan Brick Works* v. *Marion Trust Co.*, 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666.

The fact that Burroughs, the receiver, was a creditor in a small amount did not disqualify him to act. (34 Cyc. 143; *In re Eckhardt Mfg. Co.*, 114 La. 119, 38 South. 78; *Moran* v. *Wayne Circuit Judge*, 125 Mich. 6, 83 N. W. 1004; 23 Am. & Eng. Ency. of Law, 2d ed., 1034.)

MR. JUSTICE SANNER delivered the opinion of the court.

Without notice and before service of summons the court below appointed a receiver for the properties of the appellant upon a complaint of the respondent filed on November 1, 1913, seeking a money judgment in the sum of $2,251.24, being the principal sum and protest fee of an unpaid check. As special grounds for the appointment of a receiver it is alleged that the appellant was incorporated on March 20, 1912, for the purpose of constructing and operating a line of railway between Helena and points in Gallatin valley; that it procured rights of way and has graded a portion of its roadbed but has failed to complete fifteen miles of any part of its line, or any branch or extension thereof, and has forfeited its corporate rights; that it is insolvent and has no property save the right of way and partially constructed roadbed above mentioned, and some office fixtures, all of the value of $40,000; that it is indebted to various persons to an aggregate amount exceeding such value, and is unable to complete its roadbed or keep the same in repair, and the same is being damaged by the elements and by use of a part thereof as a wagon roadway; that the appellant "allowed the A. B. Bennett Company, a creditor of defendant, to file a lien upon said right of way and roadbed on the 2d day of October, 1912, to secure the sum of $27,461.06, * * * and on the 28th day of October, 1912, allowed one G. T. Morris to file a mechanic's lien upon said property for the sum of $360.40," which liens have not been paid or satisfied; that new indebtedness is being constantly created, "thereby tending to diminish the fund out of which the plaintiff and other creditors can recover the indebtedness due from defendant, and if allowed to continue to do so, said property and fund will be greatly impaired, a large portion thereof lost to the creditors * * * and materially injured, and that there is immediate danger of the same by reason of all the facts herein set forth." Within twenty days after service of summons the appellant filed a demurrer to the complaint and a motion to strike therefrom all the allegations made in support of the prayer for a receiver,

and at the same time moved the court upon several grounds to vacate the order appointing the receiver. The demurrer and motion to strike were overruled. Upon the hearing of the motion to vacate the receivership, the court, over appellant's objection, permitted respondent to file two certain affidavits as in support of the receivership, and later entered an order denying the motion to vacate. The present appeal is from that order.

The principal question presented is whether a sufficient showing was made to warrant the receivership. The respondent contends that a sufficient showing was made under the provisions of section 6698, subdivision 5, Revised Codes. Those provisions are as follows: "A receiver may be appointed by the court in which an action is pending, or by the judge thereof: * * * 5. In cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency or has forfeited its corporate rights." This section is to be read, of course, in [1] connection with the recognized principle that receivership is an extraordinary remedy, never to be allowed except upon a showing that it is necessary. (*Berryman* v. *Billings Mut. Heating Co.*, 44 Mont. 517, 523, 121 Pac. 280; *Brown* v. *Erb-Harper-Rigney Co.*, 48 Mont. 17, 27, 133 Pac. 691.) No such showing is made by mere insolvency (*Berryman* v. *Billings Mut. Heating Co., supra; Forsell* v. *Pittsburg & Mont. Copper Co.*, 42 Mont. 412, 113 Pac. 479), nor, by a parity of reasoning, because the conduct of the corporation has been such that its corporate rights are subject to forfeiture. The complaint, it is true, alleges that the appellant has forfeited its rights by failure to complete the requisite portions of its line; but this amounts to no more than the averment of a condition upon [2] which a forfeiture might be had. That a corporation does not cease to exist, that its corporate rights are not forfeited automatically from the occurrence of a cause of dissolution or forfeiture, has been declared by this court on several occasions. (*Gans* v. *Switzer*, 9 Mont. 408, 24 Pac. 18; *Daily* v. *Marshall*, 47 Mont. 377, 133 Pac. 681; *Barnes* v. *Smith*, 48 Mont. 309, 137 Pac. 541.)

Moreover, the rule that a receivership is never to be allowed except upon a showing of necessity excludes such allowance [3] where the party has, or may have, an attachment or an execution. (*Berryman* v. *Billings Mut. Heating Co., supra; Forsell* v. *Pittsburg & Mont. Copper Co., supra.*) Apparently, this was realized by the pleader and the effect sought to be avoided by alleging the Bennett and Morris liens; but the property in question is alleged to be worth $40,000, and, assuming the Bennett and Morris liens to be enforceable, there still remains for the satisfaction of respondent's claim for less than $2,500, a margin of over $10,000; and a receiver could do no more for the protection of respondent, in the face of those liens, than the respondent could do for itself. If, on the other hand, the Bennett and Morris liens are not enforceable—as appears to be the case, since no suits are alleged to have been brought upon them, although more than a year elapsed between their filing and the commencement of this action—then the respondent is in still better position to protect itself pending the suit, without a receiver.

The contention is earnestly made, however, that it was the right and duty of respondent to seek the receivership as a measure to protect itself and other creditors, because the property of a corporation is a trust fund for the benefit of all the creditors, no one of which is permitted to secure a preference. Upon the face of the complaint it is clearly indicated that respondent acted only for itself; and if is not true that any obligation rested upon it to consider either the interests of appellant [4] or those of other creditors. The trust fund doctrine as invoked by counsel is not the law of this jurisdiction. (*Ames & Frost* v. *Heslet*, 19 Mont. 188, 61 Am. St. Rep. 496, 47 Pac. 805.)

It is not necessary to determine whether error was committed by the court in receiving and considering the affidavits presented on the hearing, because these affidavits did not and could not avoid the fact that respondent had an adequate remedy at

law. This being true, the receivership was unauthorized and the order appealed from must be reversed. So ordered.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

KIMES, APPELLANT, *v.* NORTHERN PACIFIC RY. CO. ET AL., RESPONDENTS.

(No. 3,402.)

(Submitted September 16, 1914. Decided November 10, 1914.)

[144 Pac. 156.]

Real Property—Title—Verbal Assertion—Statute of Limitations—Laches—Estoppel.

Real Property—Title—Statute of Limitations.

1. *Held* that plaintiff's action to recover land claimed by him to have been rightfully entered by him under the public land laws of the United States, but wrongfully patented to the Northern Pacific Railway Company under its land grant, was barred by the provision of section 6451, Revised Codes, because not commenced until fifteen years after patent to the railway company.

Same—Verbal Assertion of Title—Statute of Limitations.

2. Mere verbal assertion of title to real estate does not prevent the running of the statute of limitations.

[As to burden of proof on plea of statute of limitations, see note in 81 Am. Dec. 725.]

Same—Laches—Estoppel.

3. Where a claimant of land permitted thirty years to elapse before he seriously attempted to enforce his claim, and during that time the value of the land had increased more than a hundred-fold, and innocent third parties without notice of his claim had purchased portions thereof and expended time and money in their improvement, he was estopped by laches in prosecuting his alleged right.

[As to estoppel to plead statute of limitations, see note in 95 Am. St. Rep. 411.]

Appeal from District Court, Custer County; Sydney Sanner, Judge.

ACTION by John Kimes against the Northern Pacific Railway Company, James H. Daly and others. From a decree in favor of defendants, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Mr. G. W. Myers, for Appellant, submitted a brief and argued the cause orally.

Messrs. Loud, Collins, Brown, Campbell & Wood, and *Mr. Grafton Mason,* for Respondents, submitted a brief; *Mr. Chas. S. Loud* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This suit was instituted to secure a decree adjudging the defendants to be trustees, and to hold in trust for the use and benefit of the plaintiff, the south half, southeast quarter of section 27, township 8 north, range 47 east, adjoining the corporate limits of Miles City in Custer county, Montana.

The contention of the plaintiff is that at the time the Northern Pacific Railroad (now Railway) Company filed the map showing the definite location of the route of its road under the Northern Pacific land grant of July 2, 1864 (13 Stats. at Large, 365), he was a *bona fide* settler upon the land in question, qualified to enter the same under the public land laws of the United States, and had tendered for filing his pre-emption declaratory statement, which was erroneously refused by the local land officials; that he was thereby wrongfully deprived of his right to secure such land; that the patent thereafter issued to the railway company was wrongfully issued, and that he is now entitled to have the legal title conveyed to him by the railway company and its grantees. The defendants' joint answer is in effect a general denial, and also pleads laches and the bar of certain statutes of limitations. The trial court made elaborate findings, 7, 9, 10 and 12 of which are to the effect that from 1884 to 1910 plaintiff did not cultivate or improve, or maintain any inclosure of, the land, nor did he assert any dominion over it except by word of mouth and by herding cattle upon it in common with other people, and that for more than ten years prior to the commencement of this suit he was not in possession of any part of it; that defendants Evans and Daly are

bona fide purchasers of certain portions of the land in controversy without notice of any claim by plaintiff; that since 1902 certain other portions of the land have been in the actual possession of W. B. Jordan, who held the legal title thereto and maintained inclosure thereof, and that the lands have greatly increased in value. From these facts the court concluded that plaintiff's right, if any he ever had, was barred by his laches, and a decree followed accordingly. Plaintiff has appealed from the decree and from an order denying him a new trial.

Concerning land embraced in odd-numbered sections within the exterior limits of the Northern Pacific grant, certain questions have been definitely determined by the Act of July 2, 1864, itself and the construction placed thereon by the supreme court in *Nelson* v. *Northern Pac. Ry. Co.*, 188 U. S. 108, 47 L. Ed. 406, 23 Sup. Ct. Rep. 302, and numerous other cases. But the question presented by this record is not what right plaintiff might have asserted in 1881, but rather, what was the status of his claim in 1911 when this suit was instituted? The findings made by the trial court are not only fully sustained by **[1, 2]** the record, but the evidence justifies the additional finding that during all the years intervening between 1884 and 1910, plaintiff without protest stood by and saw this land purchased and improved by innocent parties without notice of his claim, during a period when the market value increased a hundredfold or more. Plaintiff may have been most unfortunate in his selection of counsel to prosecute his claim, but the rule of law is too well settled now to admit of its suspension to meet the exigencies of an isolated case: that mere verbal assertion of title to real estate, by one who is not in possession, will not prevent the running of the statute of limitations. (*Lockey* v. *City of Bozeman*, 42 Mont. 387, 113 Pac. 286.) Patent to this land issued to the Northern Pacific Railway Company on January 15, 1896. This action was not commenced until 1911, and, in our opinion, plaintiff's right was barred by the provision of section 6451, Revised Codes. (*Mantle* v. *Speculator M. Co.*, 27 Mont. 473, 71 Pac. 665.)

But a conclusion different from the one reached by the trial court was out of the question. At the time plaintiff tendered [3] for filing his pre-emption declaratory statement, the market value of this land was about $2.60 per acre. Thirty years elapsed before he took any serious steps looking to the enforcement of his claim, and during that time the value had increased a hundred-fold or more, innocent third parties without any notice of his claim had purchased portions, expended their time and means in improving the same and in establishing their homes. To permit plaintiff to sit idly by without making protest during all these years while the changes indicated were being effected, and now at this late date to come in and assert his claim, dispossess the present owners and appropriate the fruits of their industry to his own use, would be unconscionable. It is one of the maxims of the law, that "equity aids the vigilant, not those who slumber on their rights." (Sec. 6195, Rev. Codes.)

In *Kavanaugh* v. *Flavin*, 35 Mont. 133, 88 Pac. 764, this court quoted with approval from *Hammond* v. *Hopkins*, 143 U. S. 224, 36 L. Ed. 134, 12 Sup. Ct. Rep. 418, the following: "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred." To the same effect are *Streicher* v. *Murray*, 36 Mont. 45, 92 Pac. 36, and *Mantle* v. *Speculator M. Co.*, above.

In the absence of any excuse for his failure to assert his claim at an earlier date, the conclusion of the trial court that plaintiff's cause of action was barred by his laches is clearly correct.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SANNER, being disqualified, takes no part in the foregoing decision.

STATE EX REL. MORE, RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,571.)

(Submitted November 9, 1914. Decided November 16, 1914.)

[143 Pac. 1193.]

Certiorari—Liquor Licenses—Right of Appeal—District Courts—Jurisdiction—Parties—Stipulations.

Liquor Licenses—Who may Appeal.

1. *Held*, on *certiorari*, that the right of appeal from a decision of a board of county commissioners granting a license to sell liquor in an unincorporated place notwithstanding remonstrance, can, under section 3, Chapter 35, Laws of 1913, be exercised by no less number of interested and qualified freeholders than is required in support of the petition for license, *viz.*, twenty, and that therefore an attempted appeal by one only of twenty-eight remonstrants was ineffectual to clothe the district court with jurisdiction to hear the appeal.

[As to who may appeal as an interested or injured party, see note in 119 Am. St. Rep. 740.]

Same—Appeal—Parties—Stipulations—Jurisdiction.

2. On appeal from a decision of a board of county commissioners granting a liquor license, neither it nor any of its members was a party to the proceeding; hence a stipulation between counsel for the board and an appealing protestant, as to the facts involved, made without notice to the petitioner for license, had no binding force upon the latter, and the district court in hearing the appeal upon such stipulation acted without jurisdiction, rendering the resulting order canceling the license void.

Original application for writ of *certiorari* by the state on the relation of A. M. More to review the action of the district court of Hill county and John W. Tattan, a judge thereof, in directing a liquor license theretofore issued to relator to be canceled. Order annulled.

Mr. F. W. Turcotte, for Relator, submitted a brief and argued the cause orally.

Mr. J. K. Bramble, for Respondents, submitted a brief.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On July 21, 1914, A. M. More presented to the board of county commissioners of Hill county his petition, duly signed

by the required number of qualified freeholders, requesting that a license be issued to him to engage in the retail liquor business at Hingham, Montana. Due notice was given, and on August 25 Frank Spaulding and twenty-eight other freeholders residing within the village of Hingham presented their protest. After a hearing the board on September 16 granted the petition and ordered the license to issue. On September 19 Spaulding, alone of the protestants, gave notice of appeal to the district court in and for Hill county from the order granting the license. A transcript of the proceedings before the board, duly certified, was transmitted to the clerk of the district court and the proceeding docketed. On October 22 the county attorney of Hill county, acting for the board of county commissioners, and the attorney for the appealing protestant entered into a stipulation as to the facts involved, and upon such stipulation the district court, without notice to the petitioner and without any opportunity on his part to be heard, entered an order reversing the order of the board and directing that the license which had been issued to the petitioner be canceled. Thereupon this proceeding in *certiorari* was instituted. Of the questions argued in the briefs, but two need be considered at this time.

1. The statute governing the issuance of liquor licenses is found in Chapter 35, Laws of 1913. Section 3 prescribes the [1] procedure before the board of county commissioners and upon appeal to the district court. That same section provides: "From the decision of the board of county commissioners the applicant for license or the protestants against the issuance thereof, may appeal to the district court," *etc.* It was within the power of the legislature to grant the right of appeal to any protestant, but it was not done. The theory upon which the statute proceeds is, that the question whether a license shall issue for the conduct of the saloon business in any unincorporated place is one which primarily concerns the immediate community. On the one hand, the mere desire of an individual to procure such license is regarded as of no consequence. The petition for license must have the support of at least twenty

freeholders who reside within ten miles of the place where the business is to be conducted; and unless, in a given instance, the petition bears the signatures of the required number of qualified persons, the board of county commissioners does not acquire jurisdiction of the subject matter and cannot proceed. On the other hand, the statute declines to give recognition to the opposition of a single individual, or a comparatively few individuals, to the issuance of such license. To make the opposition effective for any purpose, a remonstrance or protest must be filed with the board bearing the signatures of at least twenty freeholders of the village, camp or township where the business is sought to be conducted.

If this theory of the legislation is correct—and we think it is—then it becomes apparent that in section 3 above, the term "protestants" was used advisedly, and that to secure a hearing at any stage of the proceeding there must be at least twenty interested and qualified freeholders who make known their opposition in the manner indicated by the statute. If it is ever desirable that the right of appeal be conferred upon a less number of protestants, the legislature and not the courts must make the change which will confer the right. The attempt by one protestant only to appeal in this instance was ineffectual for any purpose, and failed to clothe the district court with jurisdiction to proceed.

2. In case an appeal is taken from an order of the board granting or refusing a license, it "shall be taken and heard in the same manner as appeals from justices' courts." (Sec. 3 above.) The hearing before the board is analogous to a trial before a justice of the peace. The petitioner for the license is the plaintiff; the protestants are the defendants, and the board of county commissioners is the court. (*State ex rel. Hackshaw* v. *District Court*, 48 Mont. 477, 138 Pac. 1100.) Upon such hearing the board exercises *quasi*-judicial powers. (*State ex rel. Lang* v. *Furnish*, 48 Mont. 28, 134 Pac. 297; *State ex rel. Arthurs* v. *Board of County Commissioners*, 44 Mont. 51, 118 **[2]** Pac. 804.) Upon appeal to the district court neither the

board nor any of its members is in any sense of the term a party to the proceeding; and neither the board "nor any member of it has any interest in the proceedings, other than such as a justice of the peace has in an ordinary action removed by appeal from his court." (*State ex rel. Hackshaw* v. *District Court, supra.*) Even assuming, for the purposes of this argument, that protestant Spaulding alone could prosecute an appeal, the stipulation made by him and the board of county commissioners as to the facts governing this proceeding was a mere nullity and furnished no basis whatever for a decision by the court. The petitioner More could not be denied his day in court. His rights in this instance were either ignored altogether or attempted to be stipulated out of existence by the board, which was not a party to the proceeding and not concerned in the outcome. It would be a most absurd anomaly in the law to permit a justice of the peace before whom a trial had been had to go into the district court when the cause is removed there by appeal, and stipulate with the party losing below that the judgment he had rendered was erroneous and might be reversed—and all without notice to the party who prevailed in the justice of the peace court.

Because the board of county commissioners was not a party to this proceeding in the district court and not interested in the outcome, its stipulation as to the facts was of no value, and could not bind the petitioner for the license. The district court in its trial of the proceeding upon such stipulation, without notice to the petitioner or an opportunity upon his part to be heard, acted without jurisdiction, and the resulting order was null and void.

The order of the district court is annulled and set aside.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

PENTZ, APPELLANT, *v.* CORSCADDEN, RESPONDENT.

(No. 3,422.)

(Submitted November 9, 1914. Decided November 16, 1914.)

[144 Pac. 157.]

Nonappealable Order.

1. An order entered in the minutes of the court sustaining a demurrer to the complaint and directing a dismissal of the action, *held* nonappealable.

[As to what judgments and orders may be appealed from, see note in 20 Am. St. Rep. 173.]

Appeal from District Court, Ravalli County; R. Lee McCullough, Judge.

ACTION by Percy Pentz against George Corscadden. Appeal dismissed.

Cause submitted on brief of Appellant; there being no appearance on behalf of Respondent.

Mr. George T. Baggs, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiff in the court below has attempted to appeal from an order sustaining a demurrer to his complaint and directing the [1] dismissal of his action. There was not any judgment entered but only a minute entry of the order. The order is not a judgment (Rev. Codes, secs. 6710, 7139; *State ex rel. Allen* v. *Hawkins*, 33 Mont. 177, 82 Pac. 952; *Lisker* v. *O'Rourke*, 28 Mont. 129, 72 Pac. 416, 755; *Butte & B. C. M. Co.* v. *Montana Ore Pur. Co.*, 27 Mont. 152, 69 Pac. 714); neither is it one of the enumerated orders from which an appeal can be taken (sec. 7098, Rev. Codes), and therefore this court is without jurisdiction to consider the appeal.

The pretended appeal is dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. ROWE, RELATOR, *v.* KEHOE, COUNTY CLERK, RESPONDENT.

(No. 3,568.)

(Submitted October 27, 1914. Decided November 17, 1914.)

[144 Pac. 162.]

County Officers—Sheriffs—Vacancies—Appointees—Tenure—Statutes—Constitution—Words and Phrases—Interpretation—Rule—Boards of County Commissioners—Powers and Duties—General and Special Elections—Proclamation and Notice—Ballots—Injunction.

County Officers—Vacancies—Appointees—Tenure—Statutes—Unconstitutionality.

1. Under section 5, Article XVI, of the Constitution, declaring that the appointees to vacancies in county offices [exclusive of county attorney, clerk of district court and justice of the peace] shall hold until the next general election, *held* that section 1 of Chapter 5, Laws of 1913, which extends the tenure of such appointees "until the first Monday in January next after a general election," is invalid.

(MR. JUSTICE SANNER not concurring.)

Constitution—Interpretation—Rule.

2. The words used in the Constitution are presumed to have been employed in their natural, ordinary sense, and must be so taken and understood unless the context in which they occur requires that they be assigned a different meaning, or other provisions on the same subject limit, qualify or enlarge their scope.

County Officers—Vacancies—Power to Fill.

3. Though the general power lodged in the board of county commissioners to fill vacancies in county offices must be narrowly construed, yet in case of a vacancy in an office the filling of which is not specifically provided for, the board should exercise its power in order to prevent an interregnum in the office and the consequent suspension of the public business.

Same—Vacancies—Duty of County Commissioners.

4. *Held,* under sections 451, 453 and 455, Revised Codes, that in case of vacancies in county offices, boards of county commissioners have the power, and it is their duty, to call and provide for the holding of special elections to fill them.

Elections—Statutes Regulating Mode Necessary.

5. In the absence of statutory provisions regulating the mode and manner of elections, the people, though entitled under the Constitution to elect their own officers, cannot exercise such right.

[As to irregularities that will avoid an election, see note in 90 Am. St. Rep. 46.]

Same—General and Special Elections—Presumptions.

6. While electors are conclusively presumed to know the time for holding general elections as well as what officers are to be elected, they may

not be charged with knowledge of the fact that a vacancy has occurred which they may fill on the same day a general election takes place.

Same—Special Elections—Proclamation and Notice—Ballots—Injunction.

7. *Held*, on application for injunction, that where the board of county commissioners had failed to proclaim and give notice of a special election to fill a vacancy caused by the removal of a sheriff, to be held on the day a general election was to take place, the county clerk was without authority to place upon the ballot the name of any candidate for the election to fill such vacancy.

[As to necessity for notice or proclamation of election, see note in 120 Am. St. Rep. 794.]

Original application for an injunction by the state on the relation of James H. Rowe, to restrain Dave Kehoe, as county clerk and recorder of Silver Bow county, from placing certain names on the official ballot. Writ issued.

Mr. Henry C. Smith, for Relator, submitted a brief and argued the cause orally.

Messrs. Nolan & Donovan, for Respondent, submitted a brief; *Mr. Louis P. Donovan* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Original application for an injunction. On September 10, 1914, Timothy Driscoll, who had theretofore been elected to the office of sheriff of Silver Bow county for the regular term of two years ending on the first Monday of January, 1915, was by a judgment of the district court of that county removed from office on the ground that he had been guilty of neglect in the performance of his official duty. On October 6 it was brought to the attention of the board of commissioners of the county, then sitting in regular session, that a vacancy existed in the office. Thereupon the board made an order appointing one John Berkin to fill the vacancy until his successor should be elected and qualified. Berkin at once qualified and entered upon the performance of the duties pertaining to the office, and was holding the office at the time this proceeding was instituted. On October 13, more than twenty days prior to the general elec-

tion to be held on November 3, Joseph P. Nolan, conceiving that Berkin's tenure of office would end on the day of the election, and that there would exist from that date until the first Monday in January, 1915, a vacancy to be filled by the electors at the general election, filed with the defendant clerk a petition signed by the number of electors required by section 524 of the Revised Codes, reciting the facts required therein to be stated, nominating himself a candidate for election to succeed Berkin. On the same date Berkin filed a similar petition naming himself as candidate for election to fill the same vacancy. The petitions designated both Nolan and Berkin as independent candidates. Both are qualified to hold the office. Though there are organized political parties in Silver Bow county, no one of them attempted to nominate a candidate, for the reason that the date for holding primaries had passed when the order was made removing Driscoll. The board of commissioners had not at the time the petitions were filed ordered, nor did it thereafter order, a special election to be held on November 3 to fill any vacancy in the office; nor had it then made, nor did it thereafter make, proclamation of such an election nor cause notice thereof to be given by publication in a newspaper or posting notices at the voting places in the county. When the time arrived at which it became the duty of the clerk to prepare the ballot for use by the electors on November 3, notwithstanding no special election had been ordered or proclaimed, he was proceeding to put upon it the names of Nolan and Berkin as independent candidates. Thereupon this proceeding was brought to restrain him from so doing, on the grounds (1) that there would be no vacancy to be filled for the time intervening between the date of the election and the beginning of the regular ensuing term on the first Monday in January, 1915, because Berkin would hold under his appointment, until that date, and (2) that, though Berkin's tenure of office would end on the day of election, the clerk was not authorized to put upon the ballot the name of any candidate for election to fill the vacancy, because the board had neither ordered nor proclaimed a special election to be held for that

purpose. After consideration of the provisions of law applicable, the court concluded (1) that the board of commissioners was without authority to appoint Berkin to serve beyond the date of the regular election, because there would occur a vacancy in the office to be filled by the electors at a special election regularly ordered and proclaimed, and (2) that, no proclamation having been made nor notice given of the election, the clerk was without authority to put upon the ballot the name of any candidate for election to fill the vacancy. Accordingly, the injunction was ordered to issue. Because of the near approach of the date of election and the pressure of other business, the court did not have time to state in writing the grounds for these conclusions, and for this reason delivery of the formal opinion was deferred until this time.

The following provisions of the Constitution are pertinent:

"Sec. 34. Vacancies in the office of justice of the supreme court, or judge of the district court, or clerk of the supreme court, shall be filled by appointment, by the governor of the state, and vacancies in the offices of county attorneys, clerk of the district court, and justices of the peace, shall be filled by appointment, by the board of county commissioners of the county where such vacancy occurs. A person appointed to fill any such vacancy shall hold his office until the next general election and until his successor is elected and qualified. A person elected to fill a vacancy shall hold office until the expiration of the term for which the person he succeeds was elected." (Article VIII.)

[1] "Sec. 5. Vacancies in all county, township and precinct offices, except that of county commissioners, shall be filled by appointment, and the appointee shall hold his office until the next general election." (Article XVI.)

Section 2966 of the Revised Codes reads as follows: "All vacancies in county and township offices, except county commissioner, are filled by appointment made by the county commissioners. Appointees hold until the vacancies are filled by election."

Section 1 of Chapter 5 of the Session Laws of 1913, after providing for appointment to fill vacancies in the office of county commissioner, declares: "And any county office that is filled by appointment, the appointee shall hold office until the first Monday in January next after a general election, and until his successor is elected and qualified."

The first Monday in January is the date at which the term of all county officers chosen by the electors begins, except that of treasurer. (Const., Art. XVI, sec. 5; Ord. II, sec. 9.)

It will be noted that the offices of clerk of the district court, county attorney and justice of the peace are enumerated among judicial offices, and are to be excluded from the enumeration of the offices referred to in section 5 of Article XVI of the Constitution, *supra.* Though a vacancy in any of them must be filled by appointment by the board of county commissioners, the tenure of the appointees to them is not in question in this case, section 34, Article VIII, *supra,* being specifically applicable to them. Excluding these from the list of county offices, section 5 of Article XVI, *supra,* refers only to the offices of sheriff, treasurer, county clerk, assessor, auditor, superintendent of common schools, county surveyor, coroner and public administrator.

1. The provision of the Act of 1913 was evidently intended to supplant wholly the provision of the Code. This is apparent from the fact that while under the latter the appointee held only until the vacancy could be filled by election, the former extends the tenure until the first Monday in January following the date of the general election. In effect, therefore, it declares that the appointee to a vacancy shall hold until the expiration of the remainder of the current term, without reference to when the vacancy occurs, thus precluding the idea that there may ever be an election to fill a vacancy in a county office of the class referred to in section 5 of Article XVI, *supra.* Doubtless, the legislature, in enacting this provision, proceeded upon the theory that the words of the Constitution, "Until the next general election," ought to be ignored as wholly without meaning, or must be construed as meaning, "until the person elected at the

general election for the ensuing regular term of two years may assume the office," or, in the language employed by it in the Act of 1913, *supra*, "until the first Monday in January next after the general election." In *State ex rel. McGowan* v. *Sedgwick*, 46 Mont. 187, 127 Pac. 94, this court had under consideration the question whether an appointee designated by a district judge to fill a vacancy in the office of county commissioner could lawfully hold for the remainder of the term, or only until the next general election after his appointment. After an examination of all the provisions of the Constitution on the subject of vacancies in office and the tenure of the appointees to fill them, in the light of the legislation on the subject in force at the time the Constitution was adopted, the conclusion was reached that the Constitution, by the use of the expression "until the next general election," intended to adopt and enforce the rule that the choice of public officers shall be made by the people by election whenever convenient, and that appointees to office ought to be permitted only in exceptional cases. Hence it followed that the tenure of an appointee to the office of county commissioner could not extend beyond the next general election, even though the phrase in question expressly limiting the tenure of appointees to fill vacancies in the office of county commissioner is not found in the section of the Constitution providing for the appointment. (Const., Art. XVI, sec. 4.) After further consideration of the subject, we are satisfied that the conclusion reached was correct and that it is determinative of this case. Any other conclusion would nullify the provision entirely.

In the interpretation of constitutions the cardinal rule to be [2] observed is: that words are presumed to have been employed in their natural, ordinary sense, and are to be so taken and understood unless the context in which they occur requires that they be assigned a different meaning, or other provisions on the same subject limit, qualify or enlarge their scope. (Story's Constitution, sec 451.) There is nothing in the context in which the expression in question appears in section 5 of Article XVI, *supra*, to indicate that the convention intended to use

it in any sense other than that expressed by it, as the ordinary person would understand it. "Until" is a word of limitation, used ordinarily to restrict that which precedes to what immediately follows it. Its office is to fix some point of time or some event upon the arrival or occurrence of which, what precedes will cease to exist. (*Maginn* v. *Lancaster,* 100 Mo. App. 116, 73 S. W. 368; *People ex rel. Woods* v. *Crissey,* 91 N. Y. 616; *Croco* v. *Hille,* 66 Kan. 512, 72 Pac. 208; *Jones* v. *Sizemore,* 25 Ky. Law Rep. 1957, 79 S. W. 229; *State ex rel. Watson* v. *Cobb,* 2 Kan. 32; 8 Words and Phrases, 7217.) Therefore, as the date mentioned by which the tenure of the appointee is limited is that fixed by law for the holding of the general election—that is, the first Tuesday after the first Monday in November of the alternate years, beginning with the year 1894 (Rev. Codes, sec. 450), such tenure must end on that date. So, too, the ordinary man on the street, in referring to the date of the general election, would mean, and would be understood to mean, the day of the month on which the election happens to occur, and not any other day.

Upon referring to the provision applicable to state, executive and judicial offices, it will be observed that the appointee to a vacancy in any of them holds until his successor is elected and qualified. Here the same restriction is imposed upon the tenure, though the date to which the limit extends is not definitely fixed. That the length of tenure in case of these offices is left indefinite and is made dependent somewhat upon the disposition of the newly elected incumbent to assume his duties, is not any reason why the tenure of the appointee to fill a vacancy in a county office *eo nomine,* should be held to be other than what the convention declared in plain terms it shall be. It is not for the courts to inquire what the purpose of the convention was in making different provisions for these different classes of offices, and by a process of construction undertake to declare that the convention intended to convey a meaning which its words do not express. When the courts have ascertained what the convention said and its language is clear and unambiguous, and not limited or qualified in meaning by context or by other provisions on the

same subject, the duty to interpret does not arise. The language is to be taken to mean what it says and nothing more, even though they may entertain the opinion that some other provision than the one under consideration would have been wiser.

Accordingly, since the convention declared that one appointed to fill a vacancy in a county office shall hold until the next general election, it is our duty to so declare. It was, therefore, out of the power of the legislature to ignore the provision in question and provide that appointees to fill vacancies should hold for the remainder of the regular term. Hence it follows that the Act of 1913, *supra,* is invalid, because it undertakes to extend the tenure beyond the limit fixed by the Constitution. (Mechem on Public Officers, sec. 386.) As to the office of county treasurer, it is wholly inoperative, because, since the term of this office begins on the first Monday in March, to apply the statute to it would create an interregnum for the two months following the beginning of the regular term of other offices. In enacting it, the legislature evidently entirely overlooked this office.

The provision in question does not declare that an election shall be held to fill the vacancy for the remainder of the term. **[3]** It is silent on the subject. There is no other provision in the Constitution on the subject. In view of the express limitation of the appointing power, however, and the evident purpose that appointment to office should be the exception and that the people should elect their own officers whenever convenient, it is clear that the convention intended that the remainder of the current term should be provided for by election. It was thus left to the legislature to enact the measures to carry out this intention. This it has undertaken to do, as we shall hereafter show. It may happen that if the officers vested with the authority to order and give notice of an election, fail in their duty, a second vacancy will arise upon the occurrence of the election. Also a vacancy may occur by death, resignation or removal from office after election. The convention seems to have overlooked these contingencies; but certainly no one would insist that in such a case the vacancy, with the attendant

inconvenience to the public, must continue for the remainder of the current term, merely because one appointed to fill it cannot hold until a general election within the meaning of the Constitution. So, too, a vacancy may occur before the election, but within a time too short to permit an election to he held. The fact that one appointed to fill the office would have to be reappointed after the election is no reason why the vacancy should not be filled. Upon the happening of any of these contingencies it would be the manifest duty of the board of commissioners to fill the vacancy. The general power to fill vacancies is lodged in the board, and though such power is always to be narrowly construed (28 Cyc. 1402), in case a vacancy is not specifically provided for, it should be exercised in order to prevent an interregnum in the office and the consequent suspension of the public business. And though it may happen that the proper officer or authority may omit to call an election or cannot do so under the particular emergency, nevertheless the board need not by subsequent neglect or nonaction permit the public business to be suspended. Upon the happening of either contingency, the appointed incumbent, as temporary *locum tenens*, must perform the duties of the office until his successor has qualified (Rev. Codes, sec. 355; *State ex rel. Neill* v. *Page*, 20 Mont. 238, 50 Pac. 719), so that an interregnum can never happen in any public office.

2. In his brief, and also in his oral argument, counsel for the relator made the contention that upon the assumption that the electors had a right to elect a successor to Berkin, they could not lawfully exercise it because (1) no provision has been made by the legislature for holding a special election to fill a vacancy in a county office, and (2) because, assuming that such provision has been made, the board of commissioners failed to order and proclaim an election. Counsel for defendant contend that, since the Constitution authorizes the electors to choose their officers at a time designated by law, they were entitled to select Berkin's successor without the formalities of a proclamation and notice.

A general election is one held for the election of officers throughout the state. (Rev. Codes, sec. 450.) A special [4] election is one held to supply a vacancy in a public office, or one in which is submitted to the electors a proposition to raise money for any public improvement. (Sec. 451.) A general election must be proclaimed by the governor at least sixty days before the date fixed by law. A special election to fill a vacancy in the office of state senator or member of the house of representatives must be proclaimed at least ten days before the date fixed for the election, and copies of the proclamation transmitted to the boards of commissioners of the several counties. (Sec. 452.) In either case the proclamation must contain, among other things, "a statement of the time of election, and the office to be filled." (Sec. 453, subd. 1.) Upon the receipt of such proclamation the board may, in case of a general or special election, cause a copy thereof to be published in some newspaper printed in the county and posted at each place of election, at least ten days before the date of election. In case of a special election to fill a vacancy in the office of state senator or member of the house of representatives, the board may, in its discretion, cause the proclamation to be published or posted as above stated, except it need not be published or posted longer than five days before the election. (Sec. 454.) "Whenever a special election is ordered by the board of county commissioners, they must issue an election proclamation, containing the statement provided for in subdivision 1, of section 453, and must publish and post it in the same manner as proclamations issued by the governor." (Sec. 455.)

When all these provisions are read together, the conclusion seems necessary that the legislature intended that special elections to fill vacancies in county offices should be proclaimed and notice thereof given by the board of county commissioners. Apparently, proclamation by the governor is necessary only when an election is to be held to fill offices for the regular ensuing term, except to fill vacancies in the offices of state senator and member of the house of representatives. This is suggested by the fact that section 452 does not impose upon the governor

the duty to call an election to fill any vacancy other than the two mentioned, as well as by the reflection that the governor is not presumed to know what, if any, vacancy exists in any local county office. Section 455 has no reference to elections held for raising money for public improvements referred to in the latter part of section 451. The power conferred in this behalf is exercised under special provisions on the subject, found in the part of the Codes relating to county government. (Rev. Codes, sec. 2933 *et seq.*) The section can have no meaning unless the special elections referred to are to fill vacancies in county offices. By reference to section 453 to ascertain the contents of the proclamation which the board must issue, we find that it must contain "a statement of the time of election, and the offices to be filled"—matters wholly foreign to a purpose to raise money. Taking the first part of section 451, together with sections 453 and 455, related as they evidently are by the subject matter with which they deal, *viz.*, vacancies in public office, and bearing in mind that the several boards of commissioners are presumed to know what local officers are to be elected, we think it apparent that the legislature intended to confer upon them the power to call and provide for the holding of elections to fill vacancies in county offices. It is true, the legislation is crude and does not by the most appropriate expressions confer this power; nevertheless we think it sufficiently confers the power within the rule that these boards have only such powers as are conferred upon them by the Constitution and statutes granting and defining their powers.

If it be conceded, however, that these provisions, because of their indefiniteness and lack of directness of statement, fail of their evident purpose to confer the power, the relator was entitled to the relief sought on the ground that, though [5] the people are entitled under the Constitution to elect their own officers, they cannot exercise this right in the absence of statutory provisions regulating the mode and manner of holding elections. (*Sawyer* v. *Haydon*, 1 Nev. 75; *People ex rel. McKune* v. *Weller*, 11 Cal. 49, 70 Am. Dec. 754; *People ex rel.*

Lynch v. *Budd*, 114 Cal. 168, 34 L. R. A. 46, 45 Pac. 1060; McCrary on Elections, sec. 142.)

The defendant, therefore, from either point of view, had no authority to put upon the ballot the names of any candidates other than those from among whom the electors were to choose officers for the regular ensuing term to begin on the first Monday in January, 1915.

There is some conflict in the decisions upon the question whether an election to fill a vacancy is valid in the absence of notice by the proper officer or authority. Some courts hold that where the Constitution or statute provides that a vacancy in an office must be filled at the next general election, an election held to fill such vacancy is valid though notice has not been given to the electors. (*People* v. *Cowles*, 13 N. Y. 350; *People ex rel. Speed* v. *Hartwell*, 12 Mich. 508, 86 Am. Dec. 70.) Others adhere to the doctrine that if the proper notice is not given, the election is void. (*Beal* v. *Ray*, 17 Ind. 554; *People ex rel. McKune* v. *Weller*, *supra*; *State ex rel. Sampson* v. *Superior Court*, 71 Wash. 484, Ann. Cas. 1914C, 591, 128 Pac. 1054.)

In the consideration of this case, the court reached the [6, 7] conclusion that inasmuch as an election to fill a vacancy is a special election, though to be held at the same time as the general election, and inasmuch as the statute (Rev. Codes, sec. 455) mandatorily requires notice of it to be given by publication and posting at the voting places, and these prerequisites had been entirely omitted by the board of commissioners, the election, if held, would be wholly invalid. As was stated by this court in *State ex rel. Breen* v. *Toole*, 32 Mont. 4, 79 Pac. 403, we do not question the propriety of the rule that previous notice by the proper authority is not necessary to render a general election valid. The law fixes the time for holding these elections and also names the officers to be elected. Of these facts the people may be conclusively presumed to take notice; but they cannot be presumed to know generally that a vacancy has occurred which they may fill at the date of the general elec-

tion, though they are presumed to know the date when the general election takes place. Hence, to say that formal notice by the board of commissioners as required by the statute is unnecessary is tantamount to holding that such information as the one or more condidates may choose to impart to the electors is sufficient to meet all legal requirements, whereas it is often the case, as it was in *State ex rel. Sampson* v. *Superior Court, supra,* that the candidates are more interested in suppressing knowledge of their candidacies than they are to calling them to the attention of the electors. The rule announced in *People ex rel. McKune* v. *Weller, supra,* that the provisions of the statute relating to special elections are mandatory, is sound, and serves best to prevent fraud and imposition which are not only possible but made easy under the other rule.

MR. JUSTICE SANNER: While it is my belief that all questions fairly and properly raised in a cause presented to this court should, as a general rule, be considered and settled, there is always the consideration that an Act of the legislature ought not to be declared unconstitutional unless such conclusion is necessary to the decision. Fully appreciating the objections stated by the Chief Justice to the validity of section 1, Chapter 5, Laws of 1913, I nevertheless feel that the question should be reserved, because the failure of the county commissioners to call and notice the election in question would be fatal, whether a vacancy to be filled was demonstrated or assumed. I therefore place my concurrence in the foregoing opinion upon the ground last treated therein.

MR. JUSTICE HOLLOWAY, being absent, did not hear the argument, and takes no part in the foregoing decision.

STATE EX REL. CULBERTSON FERRY CO., RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,544.)

(Submitted October 18, 1914. Decided November 18, 1914.)

[144 Pac. 159.]

Mandamus—New Trial—Issue of Fact—Definition.

Mandamus—Does not Lie, When.

1. The writ of mandate will not issue to compel the doing of an idle or useless thing.

[As to what the writ of *mandamus* is and when it is allowable, see notes in 89 Am. Dec. 728; 125 Am. St. Rep. 492.]

New Trial—Issue of Fact—Definition.

2. A new trial is the re-examination of an issue of fact created by formal pleadings in the manner prescribed by section 6723, Revised Codes, and once tried, and does not lie under any other circumstances.

[As to what proceedings are inconsistent with motion for new trial so as to waive right to move, see note in Ann. Cas. 1914B, 612.]

Default Judgment—New Trial—Issue of Fact—*Mandamus*.

3. In an action for damages for a tort, defendant filed an answer pleading, *inter alia*, a counterclaim which required a reply. No reply having been filed, judgment by default was entered awarding defendant damages as determined by a jury, under the allegations of his counterclaim, after a hearing—in the form of a trial—participated in by counsel for both parties. Plaintiff's notice of intention to move for a new trial was stricken from the files. *Held*, under the rules above, that *mandamus* did not lie to compel the reinstatement of the notice, inasmuch as an issue of fact not being presented by the pleadings, a new trial may not be had and the notice of intention, if reinstated, would therefore serve no useful purpose.

Mandamus. Original application to compel the district court of the Twelfth Judicial District, in and for the County of Sheridan, and Frank N. Utter, a Judge thereof, to reinstate relator's notice of intention to move for a new trial in its action against H. G. Hinz, alleged to have been erroneously stricken from the files. Dismissed.

Messrs. Walsh, Nolan & Scallon and *Mr. R. O. Lunke*, for Relator, submitted a brief; *Mr. Wm. Scallon* argued the cause orally.

Messrs. Norris & Hurd, for Respondents, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Mandamus. The petition avers the following facts: The relator, a ferry company, filed its complaint in the district court of Sheridan county, seeking to recover from one H. G. Hinz $500 damages for the alleged cutting of its ferry cable and to procure a decree enjoining him from interfering with it in the use and operation of a public ferry near Culbertson. Hinz answered joining issue and pleading a counterclaim in damages to the amount of $1,000 for trespass by the relator, in occupying certain of his lands without his permission for its ferry equipment and approaches. The relator did not reply, and after the time for filing a reply had passed, Hinz moved for judgment. The default of relator for failure to reply was entered by the clerk, and thereafter the cause "came on regularly for trial" before the court sitting with a jury, upon the amount of damages sustained by Hinz under the allegations of his counterclaim. A verdict for $900 was rendered and judgment was entered accordingly. Thereafter the relator served and filed its notice of intention to move for a new trial which, upon motion of Hinz, was stricken from the files. The peremptory writ of mandate of this court is now sought to compel the district court to reinstate the notice of intention and thereafter to proceed as may be proper.

It is elementary law that the writ of mandate will not [1] issue to compel the doing of an idle or useless thing (13 Ency. Pl. & Pr. 493; 26 Cyc. 147); but only to compel the performance of a clear legal duty (Rev. Codes, sec. 7214; *State ex rel. Donlan* v. *Commissioners, etc., ante,* p. 517, 143 Pac. 984). If, therefore, the relator's notice of intention was properly stricken, or if, though improperly stricken, its reinstatement would be useless, the relator cannot have relief in this proceeding.

That the counterclaim was sufficient and required a reply [2, 3] is not denied. This being so, the respondent contends that the ruling complained of was proper and that the restoration of the paper to the files would be useless, for several rea-

sons, among them this: That a motion for new trial does not lie because the allegations of the counterclaim stood admitted by failure to reply, and there was no issue of fact to be tried or retried. The relator, on the other hand, insists that as to the amount of respondent's damages there was an issue to be tried; that at the hearing the relator as well as the respondent appeared by counsel; that the relator claimed and was accorded the right to cross-examine the witnesses produced on behalf of Hinz; that witnesses were sworn and testified for the relator; that the jury were instructed by the court and addressed by counsel for both parties, and that proceedings so conducted are a trial, the results of which are subject to review on motion for a new trial.

The solution of the problem thus presented depends not so much upon what was done at the hearing as upon what was required to be done. A new trial is the re-examination of an issue of fact (Rev. Codes, sec. 6793); and unless there was an issue of fact to be tried, and which may now be re-examined, neither the participation of relator in the proceedings nor the unnecessary formality with which they were clothed can be decisive. What an "issue of fact" is and how it must be raised to be the subject of a retrial are thus settled by our Code and by the decisions of this court: "An issue of fact arises * * * 1. Upon a denial, contained in the answer, of a material allegation of the complaint; or upon an allegation, contained in the answer, that the defendant has not sufficient knowledge or information to form a belief, with respect to a material allegation of the complaint. 2. Upon a similar denial or allegation, contained in the reply, with respect to a material allegation of the answer. * * * " (Rev. Codes, sec. 6723; Code Civ. Proc. 1895, sec. 1033.) "A new trial is a re-examination of an issue of fact. * * * The expression 'issue of fact,' used in its broader sense, would include every issue of fact, whether arising upon formal pleadings or upon a motion. As used here, however, it refers only to issues of fact raised by formal pleadings, as defined in section 1033

of the Code of Civil Procedure." (*State ex rel. Heinze* v. *District Court,* 28 Mont. 227, 72 Pac. 613.) "While the provisions of the Codes relative to new trials and appeals apply generally to probate proceedings (Rev. Codes, sec. 7712), controversies which do not arise upon written pleadings authorized or required by statute do not fall within them, because a 'new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees' (Rev. Codes, sec. 6793). * * * As was pointed out in *State ex rel. Heinze* v. *District Court* (*supra*), the expression 'issue of fact' * * * refers to an issue arising upon formal pleadings only." (*In re Antonioli's Estate,* 42 Mont. 219, 111 Pac. 1033.)

In aid of its general contention, and in avoidance of the apparent effect of the foregoing expressions, the relator insists that in an action *ex delicto* the amount of damages claimed is not a material allegation; that default in such an action does not admit the amount of damages but has the effect of an interlocutory judgment only, leaving the amount of damages to be determined by the proof; that in the assessment of damages the party in default "may appear and demand a trial by a jury; that he may cross-examine the witnesses called by the plaintiff; that he may call other witnesses and prove any matter which properly goes to extenuate or mitigate the damages; that he may prove all the facts and circumstances relating to any immediate provocation, which, in judgment of the law, tends to mitigate damages; that he may require the court to give to the jury proper instructions as to the measure and extent of damages; that he may by himself and counsel argue the question of damages; that he may move for a new trial; and that he may reserve by bill of exceptions any question affecting the assessment of damages." These propositions, collected from *Briggs et al.* v. *Sneghan et al.*, 45 Ind. 14, are claimed to have support in *Loeb* v. *Kamak,* 1 Mont. 152; but a consideration of both cases will establish, we think, that they do not enforce the possibility of a new trial under the conditions stated. In this

jurisdiction, new trials are purely statutory (*Ogle* v. *Potter*, 24 Mont. 501, 62 Pac. 920; *State ex rel. Walkerville* v. *District Court*, 29 Mont. 176, 74 Pac. 414; *Vreeland* v. *Edens*, 35 Mont. 413, 87 Pac. 735; *Canning* v. *Fried*, 48 Mont. 560, 139 Pac. 448), and when we say that a new trial lies for the re-examination of an issue of fact created in the manner prescribed by section 6723, Revised Codes, we say that it lies under no other circumstances whatever. Now, the Indiana decision above cited expressly holds an allegation of the amount of unliquidated damages to be not traversible; no admission follows from failure to deny it, because no issue can arise from its denial. The same point is thus elaborated in *Loeb* v. *Kamak, supra:* "Is it necessary to state as one of the facts constituting a cause of action the amount of damages sustained? If so, then, under the Code, should the complaint fail to set forth the amount of damages sustained, a general demurrer to the complaint * * * would be sustained. Such practice we hold would not be correct. If a complaint sets forth facts showing that a party has been injured, the law presumes that he has been damaged to some extent. If he does not specify the amount of damages sustained, he will be entitled to nominal damages. A party need not allege what the law implies. If the amount of damages or the debt claimed was a material averment, then an answer traversing this allegation would raise a material issue. Yet it has been held repeatedly, since the adoption of the Code, that such a traverse raised no material issue." (See, also, *Woods* v. *Berry*, 7 Mont. 195, 201, 14 Pac. 758.) We are unable to see how the re-examination of an issue of fact raised by the pleadings can occur when there is not and cannot be such issue.

It is quite true that in actions *ex delicto* where the defendant has failed to answer or the plaintiff to reply, the court "may order the damages to be assessed by a jury" (Rev. Codes, secs. 6719, 6762); but, whatever may be the nature or underlying theory of such a proceeding, it is clearly not the trial of an issue of fact raised by the pleadings. In *Yellowstone R. R. Co.* v. *Bridger Coal Co.*, 34 Mont. 545, 115 Am. St. Rep. 546, 9 Ann.

Cas. 470, 87 Pac. 963, this court, discussing a condemnation proceeding, held the rules of practice touching appearance and answer to be applicable and said: "Construing these provisions together, it is apparent that the defendant is required to appear and make his defense as in ordinary actions. And, if he fails to appear and save default by one of the modes provided, he has no right to be heard in the subsequent proceedings. This is so notwithstanding the provision of section 2221, which requires the commissioners appointed to assess the damages, to hear the allegations and evidence of all persons interested. The latter provision evidently contemplates cases where the parties defendant are not in default, for, if they must, notwithstanding their default, be heard by the commissioners, they may appeal (sec. 2224) and still have a jury trial as to the amount of damages—a situation which, in view of the provisions applicable to ordinary actions, would be absurd."

The question at bar is thus discussed in *Foley* v. *Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122. "As to the appeals from the orders denying the motions of defendants for a new trial, they cannot be entertained. A motion for a new trial is not an appropriate proceeding to review the action of the court in giving judgment in a case where there has been no trial upon issues of fact. (Hayne on New Trial and Appeal, sec. 443; *Savings etc. Soc.* v. *Meeks*, 66 Cal. 371, 5 Pac. 624; *Gregory* v. *Gregory*, 102 Cal. 50, 36 Pac. 364; *In re Heldt*, 98 Cal. 553, 33 Pac. 549.) In this case there was no such trial, the judgment being by default against both defendants. * * * In such a case there is no office to be subserved by a new trial. A new trial is 'a re-examination of an issue of fact' (Code Civ. Proc., sec. 656); and, unless such an issue has been raised and tried, there is nothing which can be reviewed by this method.

"While appellants concede this to be the law in actions other than for divorce, they contend that in the latter class of cases there is always of necessity a trial of issues of fact; that the law raises such issues whether the defendant answers or not. But this is a misapprehension of the effect of the statute. The

Code does provide that no divorce can be granted upon the mere default of the defendant, but that the court shall in all cases 'require proof of the facts alleged' before granting the relief. (Civ. Code, sec. 130.) But the effect of that provision is not to raise 'issues of fact,' nor to constitute the taking of proof submitted by the plaintiff in cases where the defendant has not answered a 'trial,' as those terms are used in the provisions relating to new trials. Such an issue arises only where a material averment of fact is made on the one side and is controverted upon the other (Code Civ. Proc., secs. 588, 590); and the 're-examination' provided for in section 656 is where there has been a trial of such an issue. The provision of the Civil Code merely declares the policy of the law to be that in divorce cases, whether the defendant suffer default or not, the relief shall not be granted until the facts upon which it is sought are established by proof. In such an instance, however, as in any other where the defendant makes default and suffers judgment upon a mere *ex parte* showing, his remedy in seeking relief from the judgment is under section 473 of the Code of Civil Procedure, and not by motion for a new trial. (Hayne on New Trial and Appeal, sec. 9, and cases above cited.)" To the same general effect, see 1 Spelling on New Trial and Appellate Procedure, sec. 344; *Younger* v. *Moore,* 8 Cal. App. 237, 96 Pac. 1093; *Crackel* v. *Crackel,* 17 Cal. App. 600, 121 Pac. 295; *Rooker* v. *Bruce,* 171 Ind. 86, 85 N. E. 351; *Riglesberger* v. *Bailey,* 102 Ky. 608, 44 S. W. 118; *Hart Lumber Co.* v. *Rucker,* 17 Wash. 600, 50 Pac. 484.

Since there is no issue of fact presented by the pleadings to be re-examined, there can be no new trial; and since there can be no new trial, the court is under no legal duty to restore relator's notice of intention, because it can serve no purpose in the files. (*State ex rel. Heinze* v. *District Court, supra,* 28 Mont., at page 236.) The proceedings are therefore dismissed at the cost of relator.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

KERR, APPELLANT, *v.* BLAINE ET AL., RESPONDENTS.

(No. 3,424.)

(Submitted November 9, 1914. Decided November 23, 1914.)

[144 Pac. 566.]

Personal Property—Sales—Fraudulent Transfers—Mortgages—Sale by Sheriff—Applicability of Statute.

Personal Property—Fraudulent Conveyances—Judicial Sales.

1. Section 6128, Revised Codes, condemning sales of personal property not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, does not apply to judicial sales.

[As to retention of property by vendor after sale, 14 Am. Dec. 383. As to change of possession sufficient as against creditors and subsequent purchasers, see note in 97 Am. Dec. 340. As to allowing chattel mortgagee to retain possession of property and sell it, see note in 15 Am. St. Rep. 912.]

Same—Mortgages—Sale by Sheriff—Fraudulent Transfers—Applicability of Statute.

2. A sale of personal property by a sheriff under a provision in a chattel mortgage authorizing him *inter alia* to sell the property, in case default should be made in the payment of the principal or interest, *held* not a judicial sale, but to fall within the letter and spirit of section 6128, Revised Codes above.

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

ACTION by Alex Kerr against William and Robert Blaine. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Mr. D. A. Prior and *Mr. E. L. Bishop* submitted a brief in behalf of Appellant; *Mr. Prior* argued the cause orally.

Appellant contends that section 6128, Revised Codes, is not applicable to the sheriff's sale by virtue of which appellant claims title to the cattle in question for the following reasons:

1. Because the publicity and notoriety creates an exception in favor of public sales. (1 Freeman on Executions, 3d ed., 715; *Lowe* v. *Matson*, 140 Ill. 108, 29 N. E. 1036; *Sechler Carriage Co.* v. *Dryden*, 71 Ill. App. 583; *Pennington* v. *Chandler*,

5 Harr. (Del.) 394; *Clark* v. *Cox,* 118 Mo. 652, 24 S. W. 221; *Wyatt* v. *Stewart,* 34 Ala. 716; *Foster* v. *Pugh,* 12 Smedes & M. (Miss.) 416; *Boardman* v. *Keeler,* 1 Aiken (Vt.), 158, 15 Am. Dec. 670; *Greathouse* v. *Brown,* 5 T. B. Mon. (Ky.) 280, 17 Am. Dec. 67; *Garland* v. *Chambers,* 11 Smedes & M. (Miss.) 337, 49 Am. Dec. 63.)

2. Because the sale being made by the sheriff in his official capacity, pursuant to statutory authority, must be presumed to be fair until the contrary is shown. (*Matteucci* v. *Whelan,* 123 Cal. 312, 69 Am. St. Rep. 60, 55 Pac. 990; *Bisbing* v. *Third Nat. Bank,* 93 Pa. 79, 39 Am. Rep. 726; *Huebler* v. *Smith,* 62 Conn. 186, 36 Am. St. Rep. 337, 25 Atl. 658; *Clark* v. *Cox,* 118 Mo. 652, 24 S. W. 221; *Myers* v. *Harvey,* 2 Penr. & W. (Pa.) 481, 23 Am. Dec. 60.)

3. Because the sale to appellant was not made by Eli Wagoner, the former owner, in whose possession the cattle in question were claimed by respondents to have been left after the sale. (*Huebler* v. *Smith, supra; Guignard* v. *Aldrich,* 10 Rich. Eq. (S. C.) 253; *Simerson* v. *Branch Bank,* 12 Ala. 205; *Montgomery's Exrs.* v. *Kirksey,* 26 Ala. 172.)

In *Wyatt* v. *Stewart,* 34 Ala. 716, it was held that: "The retention of possession, after the sale, by the maker of a deed of trust, of property sold upon notice at public outcry by the trustee, is not *prima facie* evidence of fraud."

Messrs. Freeman & Thelen and *Mr. J. W. Speer,* for Respondents, submitted a brief; *Mr. James W. Freeman* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1911 Eli Wagoner executed a chattel mortgage upon certain personal property to the First State Bank of Cascade to secure a debt due to the bank. In June, 1912, the debt having matured and not having been paid, the bank placed in the hands of the sheriff of Cascade county a certified copy of the chattel mortgage, with directions to him to execute the power

of sale contained in it. On June 25 the sheriff sold at auction certain of the property described in the mortgage. Of that property this plaintiff, Alex Kerr, purchased eighteen yearlings, six cows and one bull. In August following, Wagoner sold these same cattle to C. C. Chambers, and later in the same month Chambers sold them to William and Robert Blaine. This action in claim and delivery was brought by Kerr to recover the possession of the cattle or their value, alleged to be $1,000. Issues having been joined, the cause was tried to the court sitting with a jury, resulting in a verdict and judgment in favor of the defendants. From that judgment, plaintiff has prosecuted this appeal.

Upon the trial, the evidence tended to show that when the plaintiff made his purchase at the sale by the sheriff, he did not take possession of the cattle but left them in the possession and under the control of Eli Wagoner, the former owner; that Chambers was a subsequent purchaser from Wagoner for value without notice of plaintiff's claim; and that, likewise, Blaine Brothers were innocent purchasers for value. The theory upon which the trial court proceeded was, that the sale by the sheriff under the power contained in the chattel mortgage fell within the provisions of section 6128, Revised Codes, and therefore there were submitted to the jury but two questions: (a) Was there an immediate delivery of the cattle to Kerr at the date of the sheriff's sale, followed by an actual and continued change of possession from Eli Wagoner to plaintiff; and (b) were Chambers and Blaine Brothers purchasers for value without notice of plaintiff's claim? The general verdict answered the first inquiry in the negative, and the latter in the affirmative; and this appeal presents only the question of the correctness of the trial court's theory of the case.

The chattel mortgage in question was a stereotyped form in general use in this state at the time it was executed. It provided that the mortgagor might remain in possession of the mortgaged property, subject, however, to a number of contingencies. If default should be made in the payment of the princi-

pal debt or interest, or if the mortgaged property should be attached at the instance of other creditors, or if any of it should be removed from Cascade county or concealed or in any other manner disposed of, or if the mortgagee should deem the possession of the property necessary to the security of its debt, then the mortgage provided that the mortgagee, its agent or attorney, or the sheriff of Cascade county, should have the right to the immediate possession of the property, with authority to sell the same at public or private sale.

The statute in force at the time these transactions occurred provided: "It is lawful for the mortgagor of personal property to insert in his mortgage a clause authorizing the sheriff of the county in which said property, or any part thereof, may be, to execute the power of sale therein granted to the mortgagee, his legal representative and assigns, in which case the sheriff of such county, at the time of default, at the request of the mortgagee, must and it is hereby made his duty to advertise and sell the whole or any part of the mortgaged property, wherever it may be, in the manner provided in such mortgage." (Sec. 5769, Rev. Codes.) Our statute upon fraudulent conveyances provides, among other things: "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors, while he remains in possession * * * and against purchasers and encumbrancers in good faith subsequent to the transfer." (Sec. 6128, Rev. Codes.) That this statute does not apply to a judicial sale is apparent from its very terms. A judicial sale is one made by order of a [1, 2] court, and not by the voluntary act of the owner of the property involved. A sale under a chattel mortgage, such as the one before us, though made by the sheriff, can only be made by him by and with the consent of the mortgagor. Unless such consent is expressed in the mortgage, the sheriff cannot by

virtue of his office, or otherwise, interfere any more than an entire stranger. The purpose of the provision in section 5769 above is not to enlarge the powers and duties of the sheriff, but to enable the parties to the chattel mortgage to require his services, if they choose to do so, and to enforce their request when made. The sale by the sheriff under the power conferred in the chattel mortgage in this instance did not bear any analogy to a judicial sale. The mortgagor, and not the sheriff, determined whether notice of such sale should or should not be given, the character of notice, if any was to be given, and whether the sale, when made, should be public or private. The only duty devolving upon the sheriff when his services were demanded was to "sell the whole or any part of the mortgaged property * * * in the manner provided in such mortgage."

From the rule that judicial sales are not within the statutes which condemn sales of personal property not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, authorities may be found which, by a parity of reasoning, deduce the conclusion that sales by trustees under powers conferred by trust deeds and similar instruments, which would include chattel mortgages of the character of the one before us, are also exempt; but such authorities proceed upon the theory that it is the publicity of the judicial sale which exempts it, whereas, in our judgment, it is its character as the act of the court which takes it without the rule, and the question of publicity does not enter into consideration. (1 Freeman on Execution, sec. 151; *Kelly* v. *Hart*, 14 Vt. 50.) If mere publicity is the determining factor, then every sale by an owner in possession of personal property is taken without the statute if, perchance, he publishes the fact that he offers his property for sale, but such is not the letter nor the meaning of the statute. The sale by the sheriff in this instance partakes much more of the characteristics of a sale by an auctioneer employed by the owner, and such sale is clearly within the letter and spirit of the law. (*Rogers* v. *Vail*, 16 Vt. 327; 2 R. C. L. 1135.)

But the sale now in question should be held to fall within the statute for the stronger reason. The very evils which called forth the rule against fraudulent conveyances at common law even before it crystallized in the original statute of 13 Elizabeth, Chapter 5, are given special prominence here. By permitting Eli Wagoner to remain in possession of this property after sheriff's sale, plaintiff placed Wagoner in a position where he might have secured credit upon the faith of his ownership of it, and did place him in a position where he resold the cattle to an innocent purchaser for value who had no notice of plaintiff's claim. Wagoner's possession was *prima facie* evidence of his ownership of the cattle. (Rev. Codes, sec. 7962, subds. 11, 12.) There was not any provision of law at that time for making a public record of the sale, and when Chambers caused the records to be searched and found only the chattel mortgage of record and it unsatisfied, he had the right to indulge the further presumption that title to the cattle remained in Wagoner and that the debt secured had not been discharged, for section 5771, Revised Codes, then in force, required that as soon as the obligation secured by a chattel mortgage was discharged, a satisfaction of the mortgage signed by the mortgagee *must* be indorsed upon it or filed with the county clerk and the proper notations made in the record, and the presumption is, "That the law has been obeyed." (Sec. 7962, Rev. Codes, subd. 33.)

Holding, as we do, that a sale by the sheriff under a power contained in a chattel mortgage falls within the scope of section 6128 above, the conclusion that the trial court properly confined the issues to the two questions which the instructions cover, follows as of course.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 3,456.—MONTANA FLOUR MILLS CO., RESPONDENT, *v.* PATRICK McCARTHY, APPELLANT.

Appeal from District Court, Meagher County.

Decided March 16, 1914.

PER CURIAM.—Respondent's motion to dismiss the appeal herein, heretofore submitted, is after due consideration by the court granted, and the appeal is accordingly dismissed.

Messrs. Belden & De Kalb, for Respondent.

No. 3,457.—IMPERIAL ELEVATOR CO., RESPONDENT, *v.* D. W. KELLY, APPELLANT.

Appeal from District Court, Valley County.

Decided March 16, 1914.

PER CURIAM.—Respondent's motion to dismiss the appeal herein is after due consideration by the court granted, and the appeal is accordingly dismissed.

Mr. G. W. Greer and *Mr. J. L. Slattery,* for Appellant.

Messrs. Norris & Hurd, for Respondent.

No. 3,347.—State, RESPONDENT, *v.* MORRIS LAWLOR ET AL., APPELLANTS.

Appeal from District Court, Lewis & Clark County; J. M. Clements, Judge.

Decided March 19, 1914.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be dismissed in accordance with the stipulation of counsel on file herein.

Mr. W. D. Rankin, for Appellants.

Mr. D. M. Kelly, Attorney General, for Respondent.

No. 3,476.—STATE EX REL. EMERSON W. SLACK ET AL., RELATORS, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of mandate.

Decided April 16, 1914.

PER CURIAM.—Relators' petition for writ of mandate herein, is after due consideration by the court denied.

Messrs. Rodgers & Gilbert and *Callaway & Callaway,* for Relators.

No. 3,465.—JOHN C. DUFF, RESPONDENT, *v.* ENSIGN S. SWEET, ADMR., APPELLANT.

Appeal from District Court, Blaine County; John A. Matthews, Judge presiding.

Decided April 18, 1914.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with stipulation of counsel on file.

Mr. W. S. Towner, for Appellant.

No. 3,485.—STATE EX REL. CLEMMY CARLSON, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of mandate.

Decided May 7, 1914.

PER CURIAM.—It is ordered that the above-entitled proceeding be dismissed in accordance with *praecipe* of counsel for relator.

Mr. E. A. Carleton, for Relator.

No. 3,454.—THOMAS F. LANE, RESPONDENT, *v.* A. D. JONES, APPELLANT.

Appeal from District Court, Gallatin County; Ben B. Law, Judge.

Decided May 16, 1914.

PER CURIAM.—It is ordered that the appeals in the above-entitled cause be, and they are hereby, dismissed in accordance with *praecipe* of appellant.

Mr. Geo. Y. Patten and *Mr. H. P. Samuell*, for Appellant.

Messrs. Carlson & Paddock, for Respondent.

No. 3,364.—RODELLA DWIGHT, RESPONDENT, *v.* BASS ETC. RANCH CO. ET AL., APPELLANTS.

Appeal from District Court, Ravalli County; R. Lee McCullough, Judge.

Decided May 16, 1914.

PER CURIAM.—The respondent's motion to dismiss the appeals herein is sustained, without prejudice, however, to any right which counsel for appellants may have, to enforce any attorney's lien they may have against any interests of appellants in the property in controversy.

Messrs. Chas. A. Loomis, E. W. Bartlett, R. B. Kirwin, Edward Horsky, H. H. Parsons and *F. C. Webster*, for Appellants.

Messrs. O'Hara, Edwards & Madeen, for Respondent.

No. 3,501.—IN RE HENRY J. LOWE.

Decided June 24, 1914.

PER CURIAM.—It appearing to this court from the certified record on file herein that on the 14th day of March, 1914, in the district court of Gallatin county, Montana, Henry L. Lowe, an attorney and counselor at law, duly admitted to practice in all the courts of this state, was convicted of the crime of rape upon a female under the age of eighteen years, it is ordered that the name of said Henry J. Lowe be stricken from the roll of attorneys, and that the said Henry J. Lowe be disbarred from the practice of law in the courts of this state.

No. 3,472.—C. C. ST. JOHN, RESPONDENT, *v.* BANK OF MONTANA, APPELLANT.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Decided July 6, 1914.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with stipulation of counsel on file.

Messrs. Geo. W. Farr, D. P. B. Marshall and *Goddard & Clark,* for Appellant.

Messrs. Loud, Collins, Campbell, Wood & Leavitt, for Respondent.

No. 3,506.—EBERHARD RIEDEL ET AL., RESPONDENTS, *v.* MOORE BROS. SHEEP CO., APPELLANT.

Appeal from District Court, Blaine County; John A. Matthews, Judge presiding.

Decided September 14, 1914.

PER CURIAM.—Respondents' motion to dismiss the appeal herein was, after due consideration, by the court granted and the appeal dismissed.

Mr. L. V. Beaulieu, for Appellant.

Messrs. Stranahan & Stranahan, for Respondents.

No. 3,511.—CULBERTSON FERRY CO., APPELLANT, *v.* H. G. HINZ, RESPONDENT.

Appeal from District Court, Sheridan County; Frank N. Utter, Judge.

PER CURIAM.—Motion to dismiss the appeal herein is, after due consideration by the court, granted and the appeal is dismissed.

Messrs. Walsh, Nolan & Scallon and *Mr. R. O. Lunke,* for Appellant.

Messrs. Norris, Hurd & McKellar and *Mr. Frank M. Catlin,* for Respondent.

No. 3,549.—STATE EX REL. LEWIS J. DUNCAN, MAYOR, ETC., RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control.

Decided September 16, 1914.

PER CURIAM.—Relator's application for writ of supervisory control herein having been this day presented to the court, it is ordered that the same be denied.

Messrs. Alex. Mackel, W. F. Davis and *N. A. Rotering,* for Relator.

No. 3,557.—STATE EX REL. TIM DRISCOLL, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control or for such other writ as may be deemed proper.

Decided September 30, 1914.

PER CURIAM.—Relator's application for writ of supervisory control, prohibition or such other writ as may be deemed proper, this day submitted to and after due consideration by the court denied.

Messrs. Walker & Walker and *Mr. Jas. E. Healy*, for Relator.

No. 3,432.—JOHN W. BLAIR ET AL., APPELLANTS, *v.* M. PETERSON ET AL., RESPONDENTS.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

Decided October 1, 1914.

PER CURIAM.—It is ordered that the appeal herein be, and the same is hereby, dismissed in accordance with *praecipe* of counsel for appellants.

Messrs. Hamblen & Gilbert and *Scharnikow & Paul*, for Appellants.

Messrs. Rodgers & Rodgers and *Mr. S. P. Wilson*, for Respondents.

No. 3,513.—STATE EX REL. A. B. COOK, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of prohibition.

Decided October 20, 1914.

PER CURIAM.—It is ordered that the above-entitled cause be, and the same is hereby, dismissed in accordance with stipulation of counsel.

Messrs. Galen & Mettler, for Relator.

Mr. Jas. A. Walsh and *Mr. Ransom Cooper*, for Respondents.

No. 3,565.—STATE EX REL. TIM DRISCOLL, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control.

Decided October 21, 1914.

PER CURIAM.—Relator's petition for writ of supervisory control herein having been this day presented to the court, it is ordered, after due consideration, that the same be denied.

Messrs. Walker & Walker and *Mr. Jas. E. Healy*, for Relator.

No. 3,469.—STATE, RESPONDENT, *v.* ANDREW J. KEMP, APPELLANT.

Appeal from District Court, Custer County; C. L. Crum, Judge.

Decided November 20, 1914.

PER CURIAM.—It is ordered that the above-entitled cause be, and the same is hereby, dismissed in accordance with motion of the attorney general on file.

Mr. D. M. Kelly, Attorney General, for Respondent.

INDEX—VOL. 49.

ACTIONS.

Dismissal for failure to have judgment entered,—see Judgments, 3, 4.
Cause of action,—see Waiver, 3.

AMENDMENTS.

See Pleading and Practice, 16–19.

To constitution,—see Constitution, 7–14.

APPEAL AND ERROR.

See, also, Bills of Exception; Undertakings.

Premature appeal,—see Corporations, 5.

Assignments of error—Waiver.
1. Specifications of error not argued in appellant's brief will be deemed waived or abandoned.—Trogdon v. Hanson Sheep Co., 1.

Exceptions.
2. Error in rulings on the admission of evidence, to which no exceptions were saved, will not be considered on appeal.—Trogdon v. Hanson Sheep Co., 1.

Offer of Proof—When Necessary.
3. Where an objection to evidence is sustained and it is not apparent what the answer of the witness would be, an offer of proof is necessary to entitle appellant to a review of the ruling.—Trogdon v. Hanson Sheep Co., 1.

Verdict—Conclusiveness.
4. The fact that on the evidence as presented to the appellate court it might have made a different finding is not sufficient to warrant disturbing a verdict which has been approved by the trial court in denying a new trial.—Trogdon v. Hanson Sheep Co., 1.

Complaint—Sufficiency—How Determined.
5. A complaint will be sustained, as against attack on the ground of insufficiency to state a cause of action, if under the facts alleged plaintiff is entitled to relief from any point of view.—Hicks v. Rupp, 40.

Cross-examination—Litigious Character of Party—Harmless Error.
6. Error in putting questions to defendant on cross-examination in an action to recover a balance due on the purchase price of land and personal property, alleged by him to have been prejudicial because an attempt to exploit his litigious character before the jury, *held* harmless, his answers not having been such as to show that he possessed the character indicated.—Lukert v. Eldridge, 46.

Undertaking on Appeal—Municipal Officers.
7. On appeal from an adverse judgment in an action against the mayor of a city in his official capacity, he is not, under section 7196, Revised Codes, required to furnish an undertaking.—State ex rel. Dwyer v. Duncan, Mayor, 54.

Trial—Technicalities.
8. In the determination of a lawsuit, an honest effort to adjust the relative rights of the parties should govern, to the exclusion of mere technicalities.—State ex rel. Dwyer v. Duncan, Mayor, 54.

Appeal—Erroneous Judgment—Final Disposition of Cause by Supreme Court—When.

9. Where it is apparent from the record on appeal that on the showing made by him in the trial court defendant was erroneously awarded judgment and that he submitted to the court and jury all he had to offer in resistance to his adversary's demand, a new trial will be denied and the cause finally disposed of by an order directing entry of judgment for appellant.—Best Mfg. Co. v. Hutton, 78.

Immaterial Variance.

10. Immaterial variances not affecting the substantial rights of the parties will be disregarded on appeal.—Willoburn Ranch Co. v. Yegen, 101.

Correct Result—Wrong Reason—Affirmance.

11. If an order granting a nonsuit was properly made, it will be sustained on appeal even though the reasons prompting it were not sound.—Cooper v. Romney, 119.

Equity Cases—Defective Record—Dismissal.

12. Appellant in an Equity Case who disregards the requirement of subdivision 3 of rule VII of the supreme court, to the effect that, where questions of fact arising upon the evidence presented in the record are submitted for review, the testimony must appear by question and answer, instead of in narrative form, is not entitled to have the appeal determined on the merits.—Northern Pacific Ry. Co. v. Hauswirth, 135.

Same—Record—Exhibits—Maps and Charts.

13. Where maps and charts were used in the trial of an action to quiet title to a portion of plaintiff railway company's right of way frequent reference to which was made by the witnesses in their testimony, the finding of the trial court *held* conclusive in the absence of these exhibits from the record.—Northern Pacific Ry. Co. v. Hauswirth, 135.

Evidence—Erroneous Admission—What not Harmless Error.

14. While prejudice will not be presumed from every erroneous ruling, still where the effect of a series of such rulings is to tell the jury that irrelevant evidence is important, it may not be said that harm did or could not result.—Hillman v. Luzon Cafe Co., 180.

Continuance—Denial—Harmless Error.

15. Denial of an application of a continuance on account of the absence of witnesses, if error, *held* harmless, where opposing counsel admitted that, if present, they would testify to the facts which the applicant stated in his affidavit for the postponement he expected to prove by them, and where it further appeared that they had no personal knowledge of the transaction at issue.—Meredith v. Roman, 204.

Contracts—Character of Work—Evidence—Harmless Error.

16. Where the answer, in an action by a subcontractor to recover a balance due him, admitted that plaintiff had done the work in conformity with the plans and specifications furnished him, testimony of plaintiff that defendant's civil engineer had stated that the work was being done to his satisfaction, though not relevant to the issues, was nonprejudicial.—Meredith v. Roman, 204.

Nonappealable Orders.

17. An order overruling a motion to quash an alternative writ of mandate is not an appealable one.—State ex rel. Frost v. Barnett, 252.

Complaint—Demurrer—Matters of Form to be Disregarded.

18. In determining a general demurrer to a complaint, matters of form as well as allegations not appropriate to the purpose sought to be attained will be disregarded; and if, upon any view, the plaintiff is entitled to relief, the pleading must be sustained.—Wheeler & Motter Mer. Co. v. Moon, 307.

Evidence—Admissibility—Technical Error—Effect.

19. Technical error in the admission of evidence is not ground for reversal unless it appears that the rights of the party complaining have been prejudiced by it.—White v. Chicago, M. & P. S. Ry. Co., 419.

Complaint—Insufficiency—Affirmance of Judgment, When.

20. If the complaint in a case in which defendant prevailed does not state a cause of action, he is entitled to an affirmance of the judgment, irrespective of the merits of plaintiff's contentions on appeal.—Cole v. Helena L. & Ry. Co., 443.

Trial—Refusal to Reopen Case—When not Error.

21. Refusal to reopen plaintiff's case after defendant's motion for a directed verdict, *held* not to have been error, where the additional testimony sought to be introduced would not have so strengthened his case as to require its submission to the jury.—Cole v. Helena L. & Ry. Co., 443.

Justices' Courts—Abstract of Judgment—Quashing Execution—Nonappealable Order.

22. An order quashing an execution issued by a clerk of the district court on an abstract of a justice's judgment, filed with and docketed by him under section 7057, Revised Codes, and striking such abstract from the files, *held* not a special order after final judgment made appealable by section 7098.—Pierson v. Daly, 478.

Appeal—Implied Findings:

23. Where the trial court fails to make formal findings, every finding necessary to support its judgment will be implied.—Croft v. Bain, 484.

Trial by Court—Evidence—Erroneous Admission—Presumptions.

24. Where a trial is had by the court without the aid of a jury, the presumption obtains that, if incompetent testimony was admitted, it was disregarded by the court in arriving at its conclusion.—State v. Driscoll, 558.

Nonappealable Order.

25. An order entered in the minutes of the court sustaining a demurrer to the complaint and directing a dismissal of the action, *held* nonappealable.—Pentz v. Corscadden, 581.

APPEALABLE AND NONAPPEALABLE ORDERS.

See Appeal and Error, 17, 22, 25.

ATTACHMENT.

See, also, Sales, 18; Receivers, 2.

Chattels in Possession of Third Person—Garnishment.

1. Since the enactment of H. B. No. 66 (Laws 1899, p. 139), amendment section 895, Code of Civil Procedure (now sec. 6662, Rev. Codes), the only method of attaching personal property in the possession of a third person has been by garnishment process, *i. e.*, by leaving with such person a copy of the writ of attachment and a notice that the property is attached by virtue of the writ.—Wheeler & Motter Mer. Co. v. Moon, 307.

ATTEMPTS.

See Criminal Law, 7–9.

ATTORNEYS.

Fees—Discretion.

1. The allowance of attorneys' fees on final settlement of a guardian's account is in the court's discretion, and its action will not be disturbed in the absence of a clear abuse thereof.—In re Allard Guardianship, 219.

Estates—Culpable Negligence—Punishment.

2. Though an attorney, who in his dealings with an estate for the administrator of which he was acting ignored practically every statutory provision designed to protect estates from spoliation, was deserving of severe censure, he may not be said to have been guilty of malpractice where the evidence disclosed an absence of evil intent and that the estate was not defrauded nor the district judge deceived by reason of his culpable negligence.—In re O'Keefe, 369.

Purchasing Testimony—Suspension.

3. An attorney, though honestly believing that unless he complied with the demand of two witnesses upon whose evidence a successful determination of his client's cause largely depended and who threatened to leave the jurisdiction in case of refusal, to guarantee them the payment of $250 out of any judgment the latter might recover (of which arrangement court and jury were made cognizant during trial, which resulted in plaintiff's favor), he would suffer defeat, *held* guilty of professional misconduct, punishable, in view of mitigating circumstances, by a thirty-day suspension.—In re O'Keefe, 369.

Same—Public Policy.

4. *Held*, as a matter of public policy, that an attorney is never justified in buying testimony, even though true.—In re O'Keefe, 369.

Conviction of Felony—Disbarment.

5. Upon filing of certified record showing an attorney to have been convicted of rape, his name will be ordered stricken from the roll of attorneys.—In re Lowe, 612.

AUTOMOBILES.

Insurance against theft,—see Insurance.

BILLS OF EXCEPTION.

See, also, Exceptions.

Settlement—Delivery to Judge.

1. Where a proposed bill of exceptions had been handed by the moving party to the clerk of the district court and by him delivered to the judge, with whom opposing counsel had lodged amendments within time so that the judge was in possession of both bill and amendments within ten days after the latter were proposed, the statute (Rev. Codes, sec. 6788) was satisfied, and the fact that appellant's counsel did not personally present them together to the clerk or the judge did not render the method pursued ineffectual.—Best Mfg. Co. v. Hutton, 78.

Presentation for Settlement—Unlawful Extension of Time.

2. Where, after the expiration of ninety days, the time for presentation of a bill of exceptions for settlement was extended by the trial judge without the consent of the adverse party (Rev. Codes, sec. 7190), the bill was too late and a new trial was properly denied.—Kirk v. Smith, 196.

BONA FIDE PURCHASER.

See Purchasers for Value.

BONDS.

See Undertakings.

BRIDGES.

Are not county property,—see Counties, 1.

Part of Highway.

1. A bridge is part and parcel of the public highway.—State ex rel. Donlan v. Board of Commissioners, 517.

Voluntary Erection by Private Person—Effect.

2. Where one voluntarily erects a bridge intending that it should be a part of the public highway and belong to the public as such, or does so under an arrangement by which he might be compensated for the labor and materials furnished in constructing it, he may not claim to be the owner or attempt to restrain the public in the free use thereof.—State ex rel. Donlan v. Board of Commissioners, 517.

Character of Property—Manner of Purchase by County.

3. A bridge is real estate for the purchase of which for county use the method prescribed by subdivision 8 of section 2894, Revised Codes, must be pursued.—State ex rel. Donlan v. Board of Commissioners, 517.

BROKERS.

Fraud—Complaint—Sufficiency.

1. *Held*, that a complaint alleging that plaintiff employed defendant to sell land for a certain sum at a given commission; that defendant falsely represented to plaintiff that in order to effectuate a sale the selling price would have to be lowered; that this was believed by plaintiff who thereupon executed a deed for such reduced consideration; that at the time such representation was made defendant had negotiated a sale at the price originally fixed; that plaintiff was thus defrauded out of the difference between the original selling price and the amount actually received by him; and that he had made demand upon defendant for restitution but had been refused,—was sufficient to constitute a cause of action.—Middlefork Cattle Co. v. Todd, 259.

BULK SALES LAW.

See Sales, 17–19.

BURDEN OF PROOF.

See, also, Criminal Law, 1, 4; Fraudulent Conveyances, 1.

Deed Absolute—Mortgage—Character of Instrument.

1. The burden which is upon him who alleges that an absolute deed is a mortgage to establish that fact by clear and convincing evidence, is sustained by showing that the debt for which the conveyance was executed remains uncanceled and is treated as an existing indebtedness. Gibson, Admx., v. Morris State Bank, 60.

New Counties—Counter-petitions.

2. A counter-petition for the exclusion of territory from a proposed new county must contain the signatures of at least fifty per cent of the qualified electors resident in the territory sought to be excluded, and the burden is on the counter-petitioners to show that fact on the hearing. State ex rel. Wood v. Board of County, 165.

Election Contests.

3. In an election contest in which the contestant relies upon the ground of the reception of illegal votes, the burden is upon him to show that a sufficient number of illegal votes were cast to change the result. Stephens v. Nacey, 230.

Automobiles—Insurance Against Theft—Criminal Intent.

4. Before plaintiff could prevail in an action to recover on a policy under the terms of which he was insured against loss by theft of his automobile, he had the burden of proving every element of the crime of larceny, including that of criminal intent in the taker to permanently deprive the owner of his property.—Valley Mer. Co. v. St. Paul F. & M. Ins. Co., 430.

Deeds—Validity.

5. One who attacks the validity of a duly executed deed has the burden of proof.—Dubbels v. Thompson, 550.

CANCELLATION OF INSTRUMENTS.

Equity—Jurisdiction.

1. Where the invalidity of an instrument which it is sought to have canceled because a cloud upon plaintiff's title, appears directly or constructively upon its face, a court of equity is, under sections 6115 and 6116, Revised Codes, without jurisdiction to interfere.—Hicks v. Rupp, 40.

Complaint—Contents.

2. To invoke the jurisdiction of a court of equity in a suit looking to the cancellation of an instrument (a contract of sale of real property in the case at bar), it was necessary for plaintiff to allege that the instrument was of such a character that, if left outstanding, it would be a menace to his title, or probably imperil it.—Hicks v. Rupp, 40.

Same—Sufficiency.

3. Complaint, though insufficient to invoke the equity power of the court to cancel an instrument said to cast a cloud upon plaintiff's title, *held* sufficient to state a cause of action at law to recover, as damages, the value of personal property delivered to defendants under a contract of sale of ranch property including said personalty, as well as of the use and occupation of the land during the period it was in their possession.—Hicks v. Rupp, 40.

CARRIERS.

See Personal Injuries, 6–9; Railroads; Street Railways.

CAUSES OF ACTION.

See, also, Waiver, 3.

Misjoinder,—see Pleading and Practice, 23.

CERTIORARI.

See Liquor Licenses, 4.

CHANGE OF VENUE.

See District Courts, 8–11.

CHATTEL MORTGAGES.

See Fraudulent Conveyances, 2, 3.

CITIES AND TOWNS.

See, also, Police Officers.

Undertakings on appeal by municipal officers,—see Undertakings, 1.

Ordinances—Force and Effect.

1. An ordinance of a city, when duly passed, has the force and effect of a statute.—State ex rel. Dwyer v. Duncan, Mayor, 54.

Special Improvement Districts—Statutes.

2. The provision of subdivision 80, section 3259, Revised Codes, lodging power in city councils to create special improvement districts for the purpose of improving the streets therein, and to charge the abutting property by special assessments for the cost thereof, *held* not to have been repealed by implication by Chapter 89, Laws of 1913.—Shapard v. City of Missoula, 269.

Same—How Created.

3. Under Chapter 89, Laws of 1913, providing the procedure for the creation of special improvement districts, the successive steps to be taken in creating such district are (1) The passage of a resolution of intention; (2) the publication of the required notice; (3) the hearing and determination of any protests filed, *etc.;* and (4) the ordering of the proposed improvements—the first three being made jurisdictional by section 3 of the Act.—Shapard v. City of Missoula, 269.

Same—Jurisdiction—When Acquired.

4. Under section 6, Chapter 89, Laws of 1913, it is only after the lapse of fifteen days from the first publication of notice of intention to create an improvement district and after all protests have been disposed of adversely to objecting property owners, that the city council shall be deemed to have acquired jurisdiction to order the improvement. Shapard v. City of Missoula, 269.

Powers—Express and Implied.

5. A municipal corporation can exercise only such powers as are expressly granted or necessarily implied in, or incidental to, the powers expressly granted, or those indispensable to the objects and purposes of the corporation, and any reasonable doubt as to the existence of power to do a particular thing must be resolved against the municipality.—Shapard v. City of Missoula, 269.

Mode of Exercise of Powers.

6. Where the mode of exercising any power granted to a municipal corporation is pointed out in the statute, that mode must be pursued in all substantial particulars.—Shapard v. City of Missoula, 269.

Special Improvements—When Proceedings Void.

7. The resolution of intention to create a special improvement district—the basis of the proceeding looking to the creation of the district—together with a notice of its adoption, is a condition precedent, the omission of which is fatal and renders all the subsequent proceedings nugatory.—Shapard v. City of Missoula, 269.

Same—Jurisdiction—How not Acquired.

8. Where jurisdiction to proceed in the creation of an improvement district has not been acquired by an observance of the antecedent steps prescribed by Chapter 89, Laws of 1913, failure of any property owner to file with the city clerk his written objection to the regularity of the proceedings, within sixty days after the letting of the contract, cannot supply it.—Shapard v. City of Missoula, 269.

Same—When Proceedings Abortive.

9. Though a mere informality in the resolution of intention to create an improvement district would not have rendered the effort of the city council to acquire jurisdiction nugatory, if the subsequent steps had

been pursued in conformity with the statute, the proceeding was abortive where a resolution of intention was deemed sufficient to bring about the creation of the district.—Shapard v. City of Missoula, 269.

CLAIM AND DELIVERY.

Detention of Chattels Pending Appeal—Damages Recoverable.

1. The successful party in an action in claim and delivery recovering damages for the detention of the chattels up to verdict in addition to their return, and whose judgment after affirmance by the supreme court has been satisfied, may maintain a separate action for damages for the detention of the property pending appeal from the judgment.—Chesnut v. Sales, 318.

COAL MINING.

See Personal Injuries, 1–5.

CONSIDERATION.

For waiver of benefit of statute of limitations in note,—see Statutes of Limitations, 3.

CONSTITUTIONAL LAW.

Statutes—Constitutionality—Considerations Entering into Determination.

1. Where attorneys general for nineteen years had advised county officers that section 3657, Revised Codes, prohibiting the remarriage of divorced persons for a certain number of years, had been repealed, the supreme court would, in case of doubt on the question whether the repealing Act had been constitutionally enacted, be inclined to uphold it in view of the disastrous consequences which would follow a contrary holding.—State ex rel. Cotter v. District Court, 146.

Interstate Commerce—Congressional Regulation Exclusive, When.

2. Under section 8, Article I, of the United States Constitution, granting to Congress the power to regulate interstate commerce, to the extent that the subjects of the commercial power are in their nature national or admit of only one uniform system or plan of regulation, congressional legislation alone is demanded, and non-action by Congress is tantamount to a declaration that they shall remain free from interference by state legislation.—Welch v. Dean, 263.

Same—Power of States—Police Power.

3. Under the police power reserved to themselves by the states, they may rightfully enforce any reasonable regulation against one engaged in interstate commerce, even though such regulation interferes indirectly with such commerce.—Welch v. Dean, 263.

Same—Police Regulations—Limit of Power of States.

4. Under the guise of enforcing police regulations, the state may not exact impossible conditions to the right to engage in interstate commerce, or impose burdens which amount directly to a regulation of it.—Welch v. Dean, 263.

Bulk Sales Law—Constitutionality.

5. The bulk sales law (Rev. Codes, secs. 6131–6135), prohibiting sales of merchandise in bulk without the seller delivering to the buyer a sworn statement of the names and addresses of all the seller's creditors and declaring that, if the buyer does not apply the purchase price to the payment *pro rata* of the *bona fide* claims

of creditors, the sale shall be fraudulent and void, *held* constitutional.—Wheeler & Motter Mer. Co. v. Moon, 307.

Statutes—Constitutionality—Duty of Courts.

6. No Act of the legislature should be declared invalid unless the conflict between its provisions and the Constitution is plainly apparent. Wheeler v. Motter Mer. Co. v. Moon, 307.

Amendments—Validity—Rule of Construction.

7. The rule that a statute will not be declared unconstitutional unless its nullity is placed beyond reasonable doubt is especially applicable in the case of an amendment to the Constitution which has been decisively adopted and the invalidity of which is charged to the manner of its submission.—State ex rel. Hay v. Alderson, 387.

Same—Unity of Subject—How Determined.

8. That an amendment to the state Constitution may be separated into two or more propositions is not alone decisive of its unconstitutionality under the clause requiring unity of subject in the submission of an amendment (Art. XIX, sec. 9); the rule being that if, in the light of common sense, the propositions have to do with different subjects so essentially unrelated that their association is artificial, they are not one, but if they may be logically viewed as parts or aspects of a single plan, the constitutional requirement above is met in their submission as one amendment.—State ex rel. Hay v. Alderson, 387.

Same—Initiative and Referendum—Validity of Amendment.

9. *Held*, under the rule above, that the amendment to section 1, Article V of the state Constitution, providing for direct legislation and reference of laws, is not invalid as violative of the provision of section 9, Article XIX, providing that should more than one amendment be submitted at the same election, it shall be done in such a manner that each can be voted upon separately.—State ex rel. Hay v. Alderson, 387.

Same—Publication—When Sufficient.

10. *Held*, that the provision of section 9, Article XIX, requiring publication of a proposed constitutional amendment in full in at least one newspaper in each county for three months previous to the next general election, was satisfied by publication in a weekly, or once a week in a daily or semi-weekly paper, in the absence of a provision indicating the number of issues in which the proposed amendment must appear, or designating the character of the paper as monthly, weekly or daily.—State ex rel. Hay v. Alderson, 387.

Same—Publication on Sunday.

11. In the absence of a prohibitory statute, any ministerial act, such as the publication of an amendment to the state Constitution, may be done on Sunday as efficaciously as if done on any other day. State ex rel. Hay v. Alderson, 387.

Same—Rule of Construction.

12. In the construction of a constitutional provision, any rule which either offends against every dictate of common sense or defeats the very object of the provision to which it is applied, ought not to be adopted.—State ex rel. Hay v. Alderson, 387.

Same—Publication—Substantial Compliance Sufficient.

13. *Held*, that the provision of section 9, Article XIX of the Constitution, respecting publication of a proposed amendment thereto, has to do with one of the features of the amending process which is referable to the rule of substantial, rather than literal, compliance, even though under section 29, Article III, the provisions of

that instrument are declared to be mandatory and prohibitory,—especially in the absence of any intimation that injury resulted from a failure to comply literally with the requirement.—State ex rel. Hay v. Alderson, 387.

Same—Initiative and Referendum—Publication—Sufficiency.

14. Under the rule that every reasonable intendment will be indulged in favor of the validity of a constitutional amendment, after its ratification by the people at the polls, the initiative and referendum amendment to section 1, Article V of the Constitution, adopted by a vote of 5.5 to 1 about eight years before its validity was questioned on the ground, *inter alia*, that the secretary of state had failed to literally comply with the constitutional requirement touching publication thereof, *held* properly submitted.—State ex rel. Hay v. Alderson, 387.

Elections—Anti-fusion Statute—Constitutionality.

15. *Held*, that the anti-fusion statute under which the name of a candidate for public office may appear but once upon the official ballot, does not trespass any constitutional provision, and is therefore a valid expression of the legislative will.—State ex rel. Metcalf v. Wileman, 436.

County Officers—Vacancies—Appointees—Extending Tenure—Statutes—Invalidity.

16. Under section 5, Article XVI, of the Constitution, declaring that the appointees to vacancies in county officers [exclusive of county attorney, clerk of district court and justice of the peace] shall hold until the next general election, *held* that section 1 of Chapter 5, Laws of 1913, which extends the tenure of such appointees "until the first Monday in January next after a general election," is invalid.—State ex rel. Rowe v. Kehoe, County Clerk, 582.

Interpretation—Rule.

17. The words used in the Constitution are presumed to have been employed in their natural, ordinary sense, and must be so taken and understood unless the context in which they occur requires that they be assigned a different meaning, or other provisions on the same subject limit, qualify or enlarge their scope.—State ex rel. Rowe v. Kehoe, County Clerk, 582.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article I, section 8 267
Article III, section 1 ..... 439, 441
Article III, section 2 414
Article III, section 14 351
Article III, section 29 412
Article V, section 1 ..... 390 *et seq.*
Article V, section 18 560
Article V, section 23 148
Article VII, section 5 460
Article VIII, sections 2, 15 480
Article VIII, section 11 160
Article VIII, section 27 560
Article VIII, section 34 ..... 585, 586
Article IX, section 9 440
Article XVI, section 4 587
Article XVI, section 5 ..... 585, 586
Article XIX, section 9 ..... 402, 412 *et seq.*
Ordinance I 241
Ordinance II, section 9 586

CONTINUANCES.

See Pleading and Practice, 20.

CONTRACTS.

See, also, Carriers, Independent Contractor, Sales.

Of Employment—Breach,—see Corporations, 24–28.

Character of Work—Irrelevant Evidence—Harmless Error.

1. Where the answer, in an action by a subcontractor to recover a balance due him, admitted that plaintiff had done the work in conformity with the plans and specifications furnished him, testimony of plaintiff that defendant's civil engineer had stated that the work was being done to his satisfaction, though not relevant to the issues, was nonprejudicial.—Meredith v. Roman, 204.

Plans and Specifications—Subcontracts.

2. A stipulation, in a subcontract for the construction of a ditch, that the work was to be done in accordance with the plans and specifications in the original contract, does not have the effect of incorporating into the subcontract a provision contained in the original one empowering the owner to assume charge of the work if it should be abandoned or unnecessarily delayed, so as to authorize the original contractor to do likewise.—Meredith v. Roman, 204.

CONTRIBUTION.

See Partnership, 4.

COPIES.

Certified,—see Evidence, 18.

CORPORATIONS.

See, also, Work and Labor, 1.

Minority Stockholders—Demand on Directors—When Unnecessary.

1. Where the board of directors of a corporation are completely dominated by one of their number, its acting secretary, a demand upon the board was not a prerequisite to an action by minority stockholders to recover money alleged to have been misappropriated by him with the consent of the board, the law not requiring the doing of a useless thing.—Kleinschmidt v. American Mining Co., Ltd., 7.

Necessary Parties.

2. Where minority stockholders sue the secretary to compel the repayment of money misappropriated, the corporation is a necessary party, the action being prosecuted for its benefit.—Kleinschmidt v. American Mining Co., Ltd., 7.

Officers—Misappropriation of Funds—Pleadings—Insolvency.

3. The right of minority stockholders to require the officers to whom has been intrusted the control of the affairs of the corporation, to account for money and funds misappropriated by them, does not depend upon whether the corporation is insolvent or likely to become so; hence omission to allege insolvency was immaterial.—Kleinschmidt v. American Mining Co., Ltd., 7.

Directors—Breach of Trust—What Constitutes.

4. The directors of a corporation, being agents and trustees of the stockholders, must exercise good faith in the administration of their trust, and, though not liable for losses resulting from mere errors of judgment, cannot divert the assets to purposes foreign to the scope of their powers, nor so direct its affairs, even when acting within

their powers, as to gain an unfair advantage or profit to themselves; their action in either event being a violation of their trust.—Kleinschmidt v. American Mining Co., Ltd., 7.

Receivers—Premature Appeal.

5. Where the decree in an action by minority stockholders indicated that a receiver would be appointed to hold and make disposition of moneys found to have been misappropriated by the secretary of a corporation, but the appointment had not been made at the time of taking an appeal, appellant's contention that the facts alleged were insufficient to warrant the appointment of such an officer was premature.—Kleinschmidt v. American Mining Co., Ltd., 7.

Voting Salary to Director—Source of Power.

6. A board of directors of a corporation has not the inherent power to vote a salary to a director; the power so to do must emanate from the stockholders, or the statute, or the by-laws legally enacted. Kleinschmidt v. American Mining Co., Ltd., 7.

Same—Directors—Compensation for Past Services.

7. Directors of a corporation cannot legally vote themselves compensation for past services.—Kleinschmidt v. American Mining Co., Ltd., 7.

Same—Misappropriation of Corporate Funds—What Constitutes.

8. Where a director of a corporation voluntarily or by the direction of the board assumes to perform the duties of secretary or treasurer without prearrangement by resolution, or by-laws, or by contract for compensation, he is not entitled to recover on a *quantum meruit* for past services, and any expenditure made by the board for such services is a misappropriation of the company's funds.—Kleinschmidt v. American Mining Co., Ltd., 7.

Same—Compensation for Past Services—Ratification.

9. Where a board of directors of a corporation had adopted by-laws providing for the appointment of a secretary but had never fixed a compensation for his services, and the duties of that office had for years been performed by one of their number without compensation, his successor, also a director, who voluntarily assumed to act as secretary with the consent of the directors and who continued as such for about five years without making a claim for remuneration, was not entitled to any for services thus performed, and the board was without power to ratify his withdrawal of funds in payment thereof.—Kleinschmidt v. American Mining Co., Ltd., 7.

Foreign Corporations—Articles of Incorporation—Filing Fee—Nature of Exaction.

10. *Held*, that the fee fixed by section 165, Revised Codes, based on the amount of capital stock, for the recording and filing of certificates of incorporation in the office of the secretary of state, is not a property tax but a license exacted of every corporation, domestic as well as foreign, engaged in intrastate business, for the privilege of doing business within the state, enjoying the protection of its laws and the pecuniary advantages afforded by its markets.—State ex rel. General Electric Co. v. Alderson, 29.

Same—Right to do Business—Nature of Right.

11. The right of a foreign corporation to engage in purely local private busines in this state is a matter of grace on the part of the commonwealth, and not a matter of right on the part of the corporation.—State ex rel. General Electric Co., v. Alderson, 29.

Same.

12. *Semble:* In view of the principle announced in paragraph 11 above, it would seem that, in the absence of any contract right of a

foreign corporation to engage in business in this state, the state might directly exclude it altogether, or do so indirectly by attaching impossible or unreasonable conditions, or such as transgress some constitutional guaranty secured to the corporation in the state of its domicile.—State ex rel. General Electric Co. v. Alderson, 29.

Articles of Incorporation—Filing Fee—Validity of Statute.

13. Section 165, Revised Codes, though inoperative so far as it authorizes the secretary of state to exact prescribed fees for recording and filing certificates of incorporation of foreign corporations engaged in *interstate* commerce, is valid as to such corporations seeking to engage in strictly private, *intrastate* business.—State ex rel. General Electric Co. v. Alderson, 29.

Corporate Capacity—General Denial—Insufficiency.

14. A general denial did not put in issue the corporate capacity of plaintiff.—Willoburn Ranch Co. v. Yeger, 101.

Creditors—Definition.

15. An employee of a mining company became its creditor on the day on which a cause of action for personal injuries accrued in his favor.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Nonconsenting Creditors—Pleading—Sufficiency.

16. An allegation that an employee who had secured a judgment for personal injuries against a mining company had no knowledge of the proceedings leading up to an alleged fraudulent sale of its property and did not assent to them, *held* a sufficient statement that he was a nonconsenting creditor.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Reorganization—Fraud in Law.

17. Where a mining corporation, which was largely indebted, agreed that the holder of its bonds should, upon default, buy in the corporate property for a sum much less than its actual value in consideration of giving certain of its creditors stock in the reorganized company and issuing to the stockholders shares in the latter, the agreement was fraudulent in law as against a nonconsenting creditor and ineffective to bar his resort to the property in satisfaction of his judgment.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Same—Fraud—Parties.

18. A corporation, against which defendant had a claim for personal injuries entered into a reorganization agreement with the plaintiff corporation, which was the holder of its bonds, the agreement providing that, upon foreclosure of the mortgage to secure the bonds, the property of the original company should be bought in by plaintiff, and that stock in the latter should be issued to the shareholders in the original company. Thereafter defendant recovered a judgment against the original company and attempted to sell, under execution, land which had been owned by it. *Held*, in a suit for an injunction, that a demurrer to defendant's answer alleging a defect of parties, was properly overruled in that defendant was not required to make the old company nor its stockholders, creditors and officers who secured the consent of each corporation to the reorganization, parties, the presence of the plaintiff corporation being sufficient for a complete adjudication of the issues.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Same—Fraud—Evidence—Sufficiency.

19. Evidence *held* to show that the steps leading up to plaintiff company's acquisition of all the property of the original corporation against which defendant held a judgment for personal injuries, enforcement of which by execution plaintiff sought to enjoin, were

had in pursuance of a plan or scheme of reorganization in fraud of the judgment creditor's rights.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Same—Nonconsenting Creditors—Fraud.

20. Proceedings looking to the foreclosure of a mortgage on corporate property, under an agreement by which stockholders of the company, who had assented to a plan of reorganization, should participate in the distribution of shares in the new company, were in fraud of the rights of a nonconsenting creditor.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Same—Fraud—Purchasers for Value.

21. Neither the creditors who participated in the agreement for the reorganization of the old company and accepted stock in the new one in consideration of their claims, nor the new corporation were in the position of innocent purchasers for value, under the circumstances detailed in paragraph 18, *supra*, as against a nonconsenting creditor.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Same—Pleading—Surplusage.

22. Where the answer, in a suit to enjoin an execution sale, alleged facts showing that the purchase by plaintiff of property of the judgment debtor was fraudulent in law, allegations that the purchase was fraudulent in fact, which were not supported by the evidence, were properly disregarded as surplusage.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Same—Execution—Restraining Sale—Parties.

23. The plaintiff (reorganized) corporation having been the real mortgagee in the mortgage given by the old company to secure its bonds, the trust company—as the nominal mortgagee and *alter ego* of the plaintiff itself—had no interest in the property independently of the persons for whom it held it in trust (the creditors and stockholders of plaintiff), and was therefore not a necessary party to a suit to enjoin an execution sale under a judgment obtained by defendant against the old company, who, in an answer seeking affirmative relief, attacked the validity of the transaction as fraudulent.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Contract of Employment—Evidence—Sufficiency.

24. Evidence, including letters interchanged between the president of defendant corporation, signed by him personally, and plaintiff, considered in the light of the circumstances under which they were written, *held* to show a contract of employment for a certain term, for the breach of which plaintiff was entitled to recover.—Edwards v. Plains Light & Water Co., 535.

Same—Acts of President—When Deemed Act of Principal.

25. Where the evidence showed that it was the intention of the president of a corporation the stock of which, with the exception of three shares for which the holders paid nothing, was owned by himself, to bind the company by letters written by him personally and relied on by plaintiff to establish a contract of employment, it became bound, under section 5449, Revised Codes, as fully as if a formal contract had thereafter been executed in its name.—Edwards v. Plains Light & Water Co., 535.

Same—Validity—Estoppel.

26. The by-laws of defendant corporation provided *inter alia*, that its president could execute contracts only upon approval by the board of directors. That officer had been permitted by the board—the members of which were his employees in other enterprises and held a share of stock each for which they had paid nothing—to exercise

all its powers, in the management of the business, the board remaining inactive. *Held* that the president, under such circumstances, at the time he entered into the contract of employment was vested with the powers of the board, and the corporation was thereafter estopped to question the validity of his act.—Edwards v. Plains Light & Water Co., 535.

Duties and Powers of Directors and Officers.

27. Though section 3836, Revised Codes, provides that the directors must perform the duties enjoined upon them by statute and the by-laws of their corporation, *etc.*, its general executive officer may, specifically or by implication, be authorized by them to conduct its business under their directions.—Edwards v. Plains Light & Water Co., 535.

Contract of Employment—Breach—Measure of Damages.

28. The measure of damages in an action to recover for the breach of a contract of employment is the amount plaintiff would have earned had he remained in the employment, at the rate stipulated, to the end of the term—even though trial is had before expiration of it—less any amount he received for services rendered to others, or might have received by the exercise of diligence to secure profitable employment after his discharge.—Edwards v. Plains Light & Water Co., 535.

How not Disolved.

29. A corporation does not cease to exist, nor are its corporate rights forfeited automatically, because of the occurrence of a cause of dissolution or forfeiture.—Prudential Securities Co. v. Three Forks etc. Ry. Co., 567.

Trust Fund Doctrine.

30. The doctrine that the property of a corporation is a trust fund for the benefit of all its creditors, no one of whom is permitted to secure a preference, does not prevail in Montana.—Prudential Securities Co. v. Three Forks etc. Ry. Co., 567.

COUNTERCLAIM.

Breach of warranty,—see Pleading and Practice, 7.

Insufficiency,—see Pleading and Practice, 15.

Must be Pleaded.

1. Where defendants had a counterclaim for supplies, *etc.*, furnished to plaintiffs, but failed to plead it, evidence touching the same was properly excluded.—Meredith v. Roman, 204.

Equity—Pleading—Sufficiency.

2. In a suit in equity, affirmative matter pleaded as a counterclaim, if sufficient in substance to warrant denial of relief to the plaintiff or to require the imposition of conditions to the granting of the same, will, though defective in form, support a decree.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

"Subject of Action"—Definition.

3. The words "subject of the action" found in section 6541, Revised Codes, providing *inter alia* that any cause of action in favor of the defendant and against the plaintiff which is connected with the subject of the action may be pleaded as a counterclaim, must be understood to refer to the origin and ground of plaintiff's right to obtain the relief asked, rather than to the thing itself about which the controversy has arisen.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

COUNTIES.

See, also, Bridges; Streets and Highways, 1–3.

New Counties—Adjustment of Property Rights—Bridges—Not County Property—*Mandamus.*

1. *Held,* on *mandamus,* that, generally, speaking, bridges—which are but portions of the public highway—are not county property, within the meaning of that term as employed in section 7, Chapter 112, Laws of 1911, the value of which shall be ascertained and considered in the adjustment of the property rights and liabilities of counties out of which a new one has been created.—State ex rel. Foster v. Ritch, 155.

Same—Creation—Petitions—Signatories—Qualifications.

2. Under Chapter 133, Laws of 1913, providing that when it is sought to divide any counties and form a new one, a petition signed by at least one-half of the qualified electors of the proposed new county, whose names appear on the registration books at the last general election, shall be presented to the board of county commissioners of the county from which the largest area is proposed to be taken, and that where the proposed county is to be formed from two or more counties separate petitions shall be presented from the territory taken from each, and each petition shall be signed by at least one-half the qualified electors of each portion, a petition for a new county to be carved out of two existing counties need only be signed by one-half of the qualified electors of the territory proposed to form the new county, as shown by the registration books used at the last general election.—State ex rel. Wood v. Board of County Commissioners, 165.

Same—Counter-petitions—Burden of Proof.

3. A counter-petition for the exclusion of territory from a proposed new county must contain the signatures of at least fifty per cent of the qualified electors resident in the territory sought to be excluded, and the burden is on the counter-petitioners to show that fact on the hearing. State ex rel. Wood v. Board of County Commissioners, 165.

Same—Counter-petitions—Verification—Proof.

4. A verification to a counter-petition asking for the exclusion of territory sought to be included in a proposed new county, which merely averred that each affiant believed that the counter-petition was signed by at least fifty per cent of the qualified electors of the territory sought to be excluded, was of no probative value as to the fact alleged.—State ex rel. Wood v. Board of County Commissioners, 165.

Same—Verification—Not Evidence of Facts Alleged.

5. The new Counties Act does not require counter-petitions for the exclusion of territory from a proposed new county to be verified nor authorize the acceptance of a verification as probative; hence a verification *held* not to be evidence of the facts alleged therein.—State ex rel. Wood v. Board of County Commissioners, 165.

Same—County Commissioners—Rehearing—Denial Proper.

6. After an order calling an election to determine whether a new county should be created had been made and the board of county commissioners clothed with jurisdiction had adjourned *sine die,* it was without power to grant a rehearing.—State ex rel. Wood v. Board of County Commissioners, 165.

COUNTY CLERK.

Duties relative to elections,—see Elections.

COUNTY COMMISSIONERS.

Formation of new counties—Duties,—see Counties, 2–6.

Granting or refusing liquor license,—see Liquor Licenses, 1–5.

Power to fill vacancies in county offices,—see Office and Officers, 1–4.
Purchase of bridges,—see Bridges, 1–3.

COUNTY OFFICERS.

Vacancies—Power to fill,—see Office and Officers, 1–4.

CREDITORS.

See Corporations, 15 *et seq.*; Sales, 17–19.

CREDITORS' SUITS.

See Sales, 18.

CRIMINAL LAW.

Larceny,—see, also, Insurance, 1, 2.
Removal of sheriff for neglect of duty,—see Sheriffs, 1–6.

Homicide—Justification—Burden of Proof—Instructions.

1. The burden of proof in a criminal case is never upon defendant to disprove the facts necessary to establish the crime with which he is charged; hence appellant, charged with homicide, was in no position to complain of an instruction which by failing to give the rule embodied in section 9282, Revised Codes, to the effect that the burden of proving circumstances of mitigation, justification or excuse devolves upon defendant, impliedly told the jury that the burden did not rest upon him at any stage of the case.—State v. Halk, 173.

Same—Cause of Death—Cross-examination.

2. Where defendant contended that the death of deceased was due to lack of proper treatment and not to the wound inflicted by him, a question asked a physician on cross-examination, who had testified as to the character of the wound, the condition in which he found deceased, *etc.*, whether the injury would have proved fatal in a few hours if deceased had received prompt and suitable treatment, was properly excluded.—State v. Halk, 173.

Same—Hypothetical Question—Proper Exclusion.

3. Offered testimony by a physician other than the one who attended deceased, that if different treatment had been resorted to death might not have ensued, *held* immaterial, it not having had a tendency to show that death resulted solely owing to improper treatment.—State v. Halk, 173.

Challenge to Jury Panel—Exception—Has Effect of Demurrer—Burden of Proof.

4. Where defendant, charged with crime, interposed a challenge to the jury panel because the sheriff had intentionally omitted to summon some of the jurors drawn by the jury commission, to which the state took an exception, the court erred in overruling the challenge on the ground that defendant had failed to sustain the burden of establishing the truth of his assertion, since by its exception (in effect a demurrer) the facts stood admitted by the state, and no burden rested upon defendant.—State v. Groom, 354.

Same—Evidence—Sufficiency.

5. Evidence adduced on the trial of a challenge to the jury panel on the second ground of challenge provided by section 9247, Revised Codes, *i. e.*, the intentional omission of the sheriff to summon one or more of the jurors drawn, which omission was testified to by that officer as having been occasioned by his imperfect knowledge of county lines incident to the creation of a new county, *held* sufficient to warrant the court in sustaining the challenge.—State v. Groom, 354.

Same—Statutes—Substantial Compliance Necessary.

6. While anything less than a substantial compliance with the statute relative to the drawing or returning of a jury is fatal, it is only a material departure from the law (Rev. Codes, sec. 9247) which may be made the basis of a challenge to the panel.—State v. Groom, 354.

Robbery—Attempt—Evidence—Insufficiency.

7. Proof of an assault, without circumstances tending to show an intent to commit robbery, *held* insufficient to convict defendant of an attempt to commit the latter crime.—State v. Hanson, 361.

Same—Intent—Evidence.

8. Testimony of a witness that accused, charged with an attempt to rob, had solicited the witness some six days before the assault to join in committing robbery was too remote to supply the basis for an inference of the specific intent required, under section 8894, Revised Codes, to be present at the time of the alleged crime.—State v. Hanson, 361.

Same.

9. While the intent with which an act is done may be inferred from the attendant circumstances, yet, when they are such as to furnish the basis for an inference of some intent other than that necessary to constitute the crime charged, or of the absence of any intent, a conviction of the crime charged cannot be sustained.—State v. Hanson, 361.

CROSS-EXAMINATION.

See Criminal Law, 2; Evidence, 3–5.

DAMAGES.

See, also, Instructions, 2; Evidence, 8.

Treble damages in unlawful detainer,—see Landlord and Tenant, 6.

Railroads—Flag Stations—Refusal to Stop Train—Exemplary Damages.

1. In an action against a railway company to recover damages for failure to stop its train at a station where it was scheduled to stop when flagged, punitive, in addition to compensatory, damages may be awarded if it is shown that the engineer saw the signal but willfully refused to stop for the purpose of receiving plaintiff as a passenger.—Burles, Admr., v. Oregon Short Line R. R. Co., 129.

Claim and Delivery—Detention of Chattels Pending Appeal.

2. The successful party in an action in claim and delivery recovering damages for the detention of the chattels up to verdict in addition to their return, and whose judgment after affirmance by the supreme court has been satisfied, may maintain a separate action for damages for the detention of the property pending appeal from the judgment.—Chesnut v. Sales, 318.

Breach of Contract of Employment—Measure of Damages.

3. The measure of damages in an action to recover for the breach of a contract of employment is the amount plaintiff would have earned had he remained in the employment, at the rate stipulated, to the end of the term—even though trial is had before expiration of it—less any amount he received, or might have received by the exercise of diligence to secure profitable employment after his discharge, for services rendered to others.—Edwards v. Plains L. & W. Co., 535.

DEEDS.

See Real Property, 1–11.

DEFAULT JUDGMENT.

See, also, New Trial, 6.

Vacation,—see Judgments, 2.

DEFENSES.

Equitable,—see Equity, 1.

Statute of limitations—Waiver,—see Statutes of Limitations.

To action for restoration to office—Estoppel,—see Police Officers, 3.

To action on purchase price—Breach of warranty,—see Pleading and Practice, 7.

To action looking to removal of sheriff from office for neglect of duty,—see Sheriffs, 5.

DEMAND.

When unnecessary,—see Corporations, 1; Reformation of Instruments, 5.

DEMURRER.

Exception has effect of,—see Criminal Law, 4.

General demurrer—Sufficiency—How determined,—see Pleading and Practice, 30.

Misjoinder of parties and causes of action,—see Pleading and Practice, 23.

Ambiguity—General Demurrer.

1. Ambiguity in a complaint cannot be reached by a general demurrer. Wheeler & Motter Mer. Co. v. Moon, 307.

DISBARMENT.

See Attorneys, 3–5.

DISCRETION.

Attorney's fees—Settlement of guardian's account,—see Guardian and Ward, 9.

Granting or refusing liquor license,—see Liquor Licenses, 3.

Mandatory Statute.

1. The fact that a statute is mandatory in requiring the district court to do a thing, under certain conditions, in the disposition of a cause, does not deprive it of discretion in determining whether a given case falls within the statute.—Rule v. Butori, 342.

Weight of Evidence—Instructions.

2. The district court has a wide discretion as to the extent it should go in submitting specific instructions relative to the weight the jury should accord evidence brought to their attention.—White v. Chicago, M. & P. S. Ry. Co., 419.

Trial—Practice—Reopening Case.

3. After a case has been closed, the matter of reopening it for the introduction of further evidence is within the discretion of the trial court, and unless there has been a clear abuse of it, its ruling thereon will not be disturbed on appeal.—Cole v. Helena L. & Ry. Co., 443.

Unlawful Detainer—Treble Damages.

4. Under section 7283, Revised Codes, when an unlawful detainer has been proven and damages have been awarded, the trial court has not any discretion, but must render judgment for treble the amount of the award.—Centennial Brewing Co. v. Rouleau, 490.

DISMISSAL.

Of action, for failure to enter judgment—When error,—see Judgments, 3, 4.
Of appeal—Defective record in equity case,—see Appeal and Error, 12.

DISTRICT COURTS.

Rule governing district judges in passing on motion for new trial asked for on the ground of insufficiency of the evidence to justify the findings in a cause tried by another judge,—see New Trial, 1.

Departments—Power of Judges.

1. Where a district court is divided into two or more departments, they constitute but one court, each of the presiding judges over which has all the power conferred upon any district judge in the state to hear and determine a cause arising in said court.—State ex rel. Little v. District Court, 158.

Trial by Particular Judge—Rights of Parties.

2. No party litigant has any vested right to have his cause heard before a particular judge.—State ex rel. Little v. District Court, 158.

Departments—Rules—Right to Make.

3. *Obiter:* Each judge of a district which has more than one judge has authority to make rules of court for the control of the business before the department over which he presides, provided they are confined to legitimate subjects for government by court rules.—State ex rel. Little v. District Court, 158.

Same—Rules—Upon Whom Binding.

4. The distribution of the business of a judicial district having more than one judge, "as equally as may be" between the judges presiding over the different departments thereof, made obligatory upon such judges by section 6278, Revised Codes, *held* to be personal to, and binding upon, those judges only who make the apportionment, rendering a redistribution necessary upon a change in their personnel, if so desired.—State ex rel. Little v. District Court, 158.

Same—Jurisdiction—Wrongful Interference—Effect.

5. *Held,* on application for writ of supervisory control under the rule declared in paragraph 4 above, that where the term of one of two judges of a district who had agreed to a rule, whereby all matters of a criminal nature were automatically assigned to one department thereof, had expired and a redistribution of the business was not made between his successor and the judge who continued in office, the former had full power to hear and determine a criminal cause based upon an indictment returned by a grand jury impaneled by him, and the latter exceeded his authority by assuming jurisdiction and quashing the indictment.—State ex rel. Little v. District Court, 158.

District Judges—Disqualification—Affidavit—Notice.

6. A party filing a disqualifying affidavit or motion for change of venue, under amended section 6315 (Chap. 114, Laws 1909), need not give notice thereof to his adversary.—State ex rel. Lohman v. District Court, 247.

Same—Affidavit—Date Immaterial.

7. The date of a disqualifying affidavit is immaterial.—State ex rel. Lohman v. District Court, 247.

Same—Power of Judges of Same District.

8. Where the business of a judicial district had been apportioned between the two judges thereof, under an agreement which did not confer on either exclusive control over any particular case from its inception to its conclusion, but provided that the judges should alter-

nately hold terms of court in one of the counties comprising the district, leaving either judge with power to do anything in any case pending in that court which could properly be brought before it, one judge could settle the pleadings in a case and the other try it; and the fact that one heard a demurrer to a pleading did not divest the other of authority to try the case, or to order a change of venue on proper application being made therefor.—State ex rel. Lohman v. District Court, 247.

Same—Change of Venue—When Compulsory.

9. Where a district judge called in to try a case, because of the disqualification of the presiding judge, fails to appear and assume jurisdiction within thirty days after filing of the motion for change of venue, the presiding judge must change the place of trial.—State ex rel. Lohman v. District Court, 247.

Same—Change of Venue—To What Court.

10. Where a district judge is disqualified for imputed bias, and the judge called in to sit in his place fails for thirty days after motion for change of venue has been filed to appear and assume jurisdiction of the case, the former must transfer it to the nearest district court of another judicial district.—State ex rel. Lohman v. District Court, 247.

Same—"Nearest District Court"—Definition.

11. The nearest district court to which a cause must be transferred under the circumstances adverted to in paragraph 10 above, *held* to be the court which can be reached by the shortest route in the usual mode of travel.—State ex rel. Lohman v. District Court, 247.

DIVORCE.

Remarriage—Statutes.

1. Section 3657, Revised Codes, regulating remarriage of divorced persons, *held* to have been repealed by House Bill 142, approved March 6, 1895, an Act to amend certain sections of the Civil Code dealing with the subject of divorce.—State ex rel. Cotter v. District Court, 146.

EJECTMENT.

Municipal Corporations.

1. Ejectment lies in favor of the owner of land taken under eminent domain without payment or tender of just compensation ascertained as prescribed by law, and the fact that the wrongdoer is a municipal corporation is immaterial, it being answerable the same as a private citizen under the same circumstances.—Flynn v. Beaverhead County, 347.

Highways—How Discontinued.

2. Where a public road had been established at public expense in strict conformity with statutory provisions and with plaintiff's consent relinquishing compensation so far as said road ran through his land, it had, under section 1338, Revised Codes, to remain such until abandoned as therein provided, and the failure of the county commissioners to comply with conditions attached to plaintiff's consent, did not clothe him with the right to maintain ejectment against the county.—Flynn v. Beaverhead County, 347.

ELECTIONS.

Special Elections—Closing of Registration Books—Statutory Construction.

1. *Held*, that sections 7 and 18, Chapter 74, Laws of 1913, the former of which requires the closing of the registration books for a period of thirty days before the holding of a special election, while the latter provides for publication of notice of such closing for thirty days prior thereto, are controlling, and that section 33 declaring that at special

elections copies of the official register and check lists used at the last preceding general election must be used, is ineffective as in contravention of the purpose of the Act, when considered in its entirety.—State ex rel. Kehoe v. Stromme, 25.

Same—Prohibition.

2. Where in calling a special election the county commissioners did not allow the county clerk sufficient time to comply with the requirements of sections 7 and 18 of Chapter 74, Laws of 1913, relative to closing registration books and giving notice thereof, the election could not legally be held, and the clerk was entitled to a writ of prohibition to prevent it.—State ex rel. Kehoe v. Stromme, 25.

Contests—Indian Reservations—Residence.

3. *Held*, that that portion of the Ft. Peck Indian reservation which was set aside by Act of Congress as the townsite of Poplar, and which was to be disposed of under section 2381, United States Revised Statutes, relating to townsites, and part of which had been patented to occupants and purchasers of lots, is not a part of an Indian reservation, within the meaning of section 499, Revised Codes, forbidding the establishment of election precincts upon Indian reservations, and Chapter 113, Laws of 1911, fixing the residence of those living upon such reservations.—Stephens v. Nacey, 230.

Same—Illegal Votes—Duty of Contestant.

4. Under section 7234, subdivision 4, and section 7239, Revised Codes, one who contests an election on the ground of malconduct on the part of the election judges in receiving the votes of persons residing on an Indian reservation must furnish the contestee, at least three days before the trial, a list of the voters deemed to have illegally voted; his failure to do so defeats him.—Stephens v. Nacey, 230.

Same—Burden of Proof.

5. In an election contest in which the contestant relies upon the ground of the reception of illegal votes, the burden is upon him to show that a sufficient number of illegal votes were cast to change the result. Stephens v. Nacey, 230.

Ballots—Anti-fusion Statute—Validity of Act.

6. *Held*, that the anti-fusion statute (Laws 1907, p. 120; Rev. Codes, sec. 545) was not impliedly repealed by the primary election law (Laws 1913, p. 570).—State ex rel. Metcalf v. Wileman, 436.

Anti-fusion Statute—Constitutionality.

7. *Held*, that the anti-fusion statute, *supra*, under which the name of a candidate for public office may appear but once upon the official ballot, does not trespass any constitutional provision, and is therefore a valid expression of the legislative will.—State ex rel. Metcalf v. Wileman, 436.

Statutes Regulating Mode Necessary.

7a. In the absence of statutory provisions regulating the mode and manner of elections, the people, though entitled under the Constitution to elect their own officers, cannot exercise such right.—State ex rel. Rowe v. Kehoe, County Clerk, 582.

General and Special Elections—Notice—Presumptions.

8. While electors are conclusively presumed to know the time for holding general elections as well as what officers are to be elected, they may not be charged with knowledge of the fact that a vacancy has occurred which they may fill on the same day a general election takes place.—State ex rel. Rowe v. Kehoe, County Clerk, 582.

EMINENT DOMAIN.

Payment—Condition Precedent.

1. Under section 14, Article III, of the Constitution, payment or tender of the amount ascertained to be due in the manner provided by law for private property intended to be taken for a public use, is a condition precedent to the acquisition of any right therein by the public.—Flynn v. Beaverhead County, 347.

Ejectment—Municipal Corporations.

2. Ejectment lies in favor of the owner of land taken under eminent domain without payment or tender of just compensation ascertained as prescribed by law, and the fact that the wrongdoer is a municipal corporation is immaterial, it being answerable the same as a private citizen under the same circumstances.—Flynn v. Beaverhead County, 347.

EQUITY.

Findings—Conclusiveness,—see Findings, 2.

Defective record in equity cases,—see Appeal and Error, 12.

See, also, Cancellation of Instruments, 1; Fraud, 1; Counterclaim; Quieting Title.

Equitable Defense—Pleading.

1. In a suit in equity, the mere pleading of an equitable defense, as such, will authorize the granting of whatever affirmative relief the pleader shows himself entitled to, consistent with his pleadings and without regard to his prayer.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

ESTATES OF DECEASED PERSONS.

See Attorneys; Guardian and Ward; Probate Proceedings.

ESTOPPEL.

See, also, Corporations, 26.

By pleadings of party,—see Pleading and Practice, 6, 10.

Landlord and Tenant—Void Lease—Repairs and Improvements by Tenant.

1. *Quaere:* Where tenants had entered into possession of premises after purchasing the business conducted therein from another lessor, under a lease alleged to have been made by them with the owner for a term of two years, which the latter, however, failed to sign, and thereupon made repairs and improvements upon the property, with knowledge on the part of the owner that they were doing so on the assumption that they could have the lease for two years, was the agreement binding upon the owner even though it had not been fully executed?—Centennial Brewing Co. v. Rouleau, 490.

Corporations—Nonaction by Directors—Validity of Acts of President.

2. The by-laws of defendant corporation provided, *inter alia*, that its president could execute contracts only upon approval by the board of directors. That officer had been permitted by the board—the members of which were his employees in other enterprises and held a share of stock each for which they had paid nothing—to exercise all its powers, in the management of the business, the board remaining inactive. *Held* that the president, under such circumstances, at the time he entered into the contract of employment was vested with the powers of the board, and the corporation was thereafter estopped to question the validity of his act.—Edwards v. Plains Light & Water Co., 535.

Real Property—Conveyances—Title.

3. Where a mortgagee by warranty deed mistakenly reconveyed to the mortgagor the mortgaged propert after transfer to him by the latter,

thus enabling his grantee to convey title to a third person, he was estopped to assert that such third person was bound at his peril to ascertain whether his mortgage lien had been extinguished.—Dubbels v. Thompson, 550.

Real Property—Assertion of Title—Laches.

4. Where a claimant of land permitted thirty years to elapse before he seriously attempted to enforce his claim, and during that time the value of the land had increased more than a hundred-fold, and innocent third parties without notice of his claim had purchased portions thereof and expended time and money in their improvement, he was estopped by laches in prosecuting his alleged right.—Kimes v. Northern Pacific Ry. Co., 573.

EVIDENCE.

See, also, Criminal Law.

Preponderance—How determined,—see Jury, 1.

Opinion Evidence—Admissibility.

1. To make expert testimony admissible it is not necessary that the witness must know the actual facts respecting the subject under consideration; he may base his opinion upon an assumed state of facts.—Trogdon v. Hanson Sheep Co., 1.

Work and Labor—*Quantum Meruit*—Corporations—Evidence—Admissibility.

2. Where labor has been performed for a corporation with the knowledge of its directors and officers and without objection on their part, it is liable on a *quantum meruit*, in the absence of an express contract under which it was performed; and evidence which brings home to such officers knowledge of the fact that plaintiff expected pay is admissible. Trogdon v. Hanson Sheep Co., 1.

Cross-examination—Litigious Character of Party—Harmless Error.

3. Error in putting questions to defendant on cross-examination in an action to recover a balance due on the purchase price of land and personal property, alleged by him to have been prejudicial because an attempt to exploit his litigious character before the jury, *held* harmless, his answers not having been such as to show that he possessed the character indicated.—Lukert v. Eldridge, 46.

Proper and Improper—Examination of Witnesses.

4. Though the mere asking of questions may constitute error, the fact that a question, otherwise pertinent and proper, may tend to prejudice a witness before the jury, furnishes no ground for its exclusion.—Lukert v. Eldridge, 46.

Litigious Character of Party Cross-examination—When Proper.

5. The litigious character of a party (or a witness) is not, generally speaking, a proper subject of inquiry; where, however, defendant, a man of wide business experience who had opportunity to and did examine land before purchasing, claimed in an action to recover a balance due on the purchase price that he had relied implicitly upon false statements made by plaintiff, a total stranger to him, and been overreached, questions on cross-examination seeking to elicit the fact that he had had many lawsuits were allowable.—Lukert v. Eldridge, 46.

Objection—Pleading—Estoppel.

6. Defendant mayor was estopped to object to the introduction in evidence of an ordinance, the existence of which he himself pleaded in his answer.—State ex rel. Dwyer v. Duncan, Mayor, 54.

Wills—Pretermission of Children—Intention of Testator.

7. Under Revised Codes, section 4755, providing that, where a testator omits to provide in his will for any of his children, unless it appears that such omission was intentional, such child must have the same share in the estate as if testator had died intestate, *etc.*, evi-

dence *dehors* the will may be received to ascertain whether the omission was intentional.—In re Estate of Peterson, 96.

Personal Injuries—Railroads—Damages—Evidence.

8. Evidence that there were not any accommodations at a flag station at which an invalid passenger was compelled to remain for about ten hours owing to the wrongful refusal of defendant company's engineer to stop his train, was admissible as reflecting upon the probability of plaintiff's claim that she underwent suffering in consequence of being forced to wait at such a place.—Burles, Admr., v. Oregon S. L. R. R. Co., 129.

Res Gestae.

9. Evidence that the invalid passenger referred to in paragraph 8 above manifested her suffering by moaning during the tedious wait for the next train, was properly admitted.—Burles, Admr., v. Oregon S. L. R. R. Co., 129.

Preponderance—How to be Determined.

10. The preponderance of the evidence does not depend alone on the number of witnesses testifying to a fact; but in determining the question the jury should consider the opportunities of the witnesses for seeing or knowing the things about which they testified, their conduct and demeanor while testifying, their interest or lack of interest in the suit, and the probability or improbability of the truth of their statements in view of all the other evidence, facts and circumstances.—Burles, Admr., v, Oregon S. L. R. R. Co., 129.

Breach of Contract—Time of Essence—Evidence—Inadmissibility.

11. Where a contract for the sale of sheep was silent as to time being of the essence of the contract, it was error, under section 5047, Revised Codes, to permit oral evidence that such was nevertheless the intention of the parties.—Curtis v. Parham, 140.

New Counties—Counter-petitions—Verification—Proof.

12. A verification to a counter-petition asking for the exclusion of territory sought to be included in a proposed new county, which merely averred that each affiant believed that the counter-petition was signed by at least fifty per cent of the qualified electors of the territory sought to be excluded, was of no probative value as to the fact alleged.—State ex rel. Wood v. Board of County Commissioners, 165.

Same—Verification—Not Evidence of Facts Alleged.

13. The new Counties Act does not require counter-petitions for the exclusion of territory from a proposed new county to be verified nor authorize the acceptance of a verification as probative; hence a verification *held* not to be evidence of the facts alleged therein.—State ex rel. Wood v. Board of County Commissioners, 165.

Work and Labor—Evidence, Sufficiency.

14. In an action for wages due, in which defendant, relying upon a motion for nonsuit, declined to introduce any testimony, plaintiff's evidence that there was due him between $400 and $500, held sufficiently specific to warrant a verdict for an amount not to exceed $400.—Loeffler v. Dunning, 177.

False Representations—Parol Evidence—Admissibility.

15. The gravamen of defendant's answer having been that a written contract had been procured by false representations to induce the purchaser of the lighting plaint, parol evidence of such representations was admissible.—Hillman v. Luzon Cafe Co., 180.

Same.

16. Under a provision of a contract guaranteeing that a machine could perform its work "up to claims," and in the absence of any claims in that respect in the writing, parol evidence of representations

by the seller were admissible under a proper pleading.—Hillman v. Luzon Cafe Co., 180.

Books of Account—When Inadmissible.

17. Account-books *held* inadmissible where the person who had kept them was not called to identify them, and where no preliminary proof had been introduced to show that they had been correctly kept in the usual course of business, or that the entries were contemporaneous with the transactions to which they related.—Meredith v. Roman, 204.

Documentary Evidence—Certified Copies—Harmless Error.

18. The admission in evidence of a certified copy of a copy of the original plat of a townsite on an Indian reservation, on file in the office of a county clerk, though erroneous (Rev. Codes, sec. 7924), *held* nonprejudicial where it was apparent that a properly certified copy could easily be procured and that no harm resulted from the use of the objectionable copy.—Stephens v. Nacey, 230.

Contracts in Writing—Parol Evidence—Admissibility.

19. A conversation between buyer and seller had prior to the execution of a bill of sale with the terms of which it was not in conflict, and which was material to show the circumstances under which the writing was executed, *held* admissible in evidence and not open to the objection that it varied the written agreement.—Sutherland v. Green, 379.

Same—Parol Agreement—Evidence—Admissibility.

20. The mere execution of a writing (bill of sale) by one party to a contract (seller) does not exclude proof of a parol agreement (sale of an animal) offered by the buyer, the terms of which had been agreed upon and the purchase price paid before execution of the bill.—Sutherland v. Green, 379.

Same—Documentary Evidence—Admissibility.

21. A tally sheet required to be kept by the buyer of the stallion and returned to the seller in the event of dissatisfaction on the part of the former, *held* admissible in an action to recover the purchase price, it having been a record made in the regular course of business for the benefit of defendant.—Sutherland v. Green, 379.

Personal Injuries—Pleadings and Proof—Admission of Irrelevant Testimony—Harmless Error.

22. Error in admitting evidence bearing upon defects in the braking appliances and the competency of the engineer in charge of the locomotive attached to the train on which plaintiff switchman was injured, because irrelevant to the issue which was whether the engineer was negligent in moving the train in defiance of a stop signal, *held* to have been rendered harmless by instructions clearly stating the question at issue and that plaintiff could recover only upon proof of the negligence alleged, and not upon proof of any other.—White v. Chicago, M. & P. S. Ry. Co., 419.

Admissibility—Technical Error—Effect.

23. Technical error in the admission of evidence is not ground for reversal unless it appears that the rights of the party complaining have been prejudiced by it.—White v. Chicago, M. & P. S. Ry. Co., 419.

Witnesses—Avowal of Ignorance of Fact—Effect.

24. The avowal of ignorance of a fact is not proof of the fact by the witness making the avowal, even though the circumstances indicate that he ought to be informed.—Croft v. Bain, 484.

Trial by Court—Erroneous Admission of Testimony—Presumptions.

25. Where a trial is had by the court without the aid of a jury, the presumption obtains that, if incompetent testimony was ad-

mitted, it was disregarded by the court in arriving at its conclusion. State v. Driscoll, 558.

EXCEPTIONS.

See, also, Bills of Exception; Appeal and Error, 2.

Exception has effect of demurrer,—see Criminal Law, 4.

EXECUTION.

See, also, Receivers, 2.

Enjoining execution sale,—see Corporations, 18 *et seq.*

EXEMPLARY DAMAGES.

See Damages, 1.

EXECUTORS AND ADMINISTRATORS.

See Probate Proceedings, 2, 3.

EXHIBITS.

Absence from record on appeal—Effect,—see Appeal and Error, 13.

EXPERT AND OPINION TESTIMONY.

See Criminal Law, 2, 3; Evidence, 1.

FEES.

Attorneys',—see Guardian and Ward, 9.

Filing articles of incorporation,—see Corporations, 10.

FINDINGS.

In equity cases—Conclusiveness—Rule governing district judges in passing on motion for new trial in cause tried by another judge,—see New Trial.

Implied Findings.

1. Where the trial court fails to make formal findings, every finding necessary to support its judgment will be implied.—Croft v. Bain, 484.

Equity—Conclusiveness.

2. The findings in an equity case, whether the result of a trial by the court or a referee, based upon substantially conflicting evidence, will be sustained on appeal unless the evidence preponderates against them.—Dean v. Stewart, 506.

FRAUD.

Complaint—Sufficiency,—see Pleading and Practice, 24.

See, also, Corporations, 17, 23; Sales, 9–19; Vendor and Purchaser, 1, 2.

Equity—Jurisdiction.

1. A court of equity will interpose its power to prevent the consummation of a fraud.—Willoburn Ranch Co. v. Yegen, 101.

Corporations—Reorganization—Fraud in Law.

2. Where a mining corporation, which was largely indebted, agreed that the holder of its bonds should, upon default, buy in the corporate property for a sum much less than its actual value in consideration of giving certain of its creditors stock in the reorganized company and issuing to the stockholders shares in the latter, the agreement was fraudulent in law as against a nonconsenting credi-

tor, and ineffective to bar his resort to the property in satisfaction of his judgment.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

FRAUDULENT CONVEYANCES.

Real Property—Burden of Proof.

1. T. executed to D. a mortgage upon real property. On default of payment of the note to secure which it was given, T. by warranty deed transferred the property to D., who did not formally release the mortgage. D. later mistakenly reconveyed to T., who knew nothing of this conveyance until delivery of it to him by the clerk after recording. T. thereafter transferred to his father, a nonresident, who was not shown to have had any knowledge of the transfer to him. In a suit by D. to foreclose the mortgage, evidence *held* to disclose that the latter transaction was fictitious, and that in the absence of any evidence on the part of T.'s father in explanation of it, a judgment in his favor was erroneous.—Dubbels v. Thompson, 550.

Personal Property—Judicial Sales.

2. Section 6128, Revised Codes, condemning sales of personal property not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, does not apply to judicial sales.—Kerr v. Blaine, 602.

Same—Mortgages—Sale by Sheriff—Fraudulent Transfers—Applicability of Statute.

3. A sale of personal property by a sheriff under a provision in a chattel mortgage authorizing him *inter alia* to sell the property, in case default should be made in the payment of the principal or interest, *held* not a judicial sale, but to fall within the letter and spirit of section 6128, Revised Codes above.—Kerr v. Blaine, 602.

GARNISHMENT.

See Attachment, 1; Sales, 18.

GOVERNOR.

Powers of,—see Martial Law.

GUARDIAN AND WARD.

Settlement of Final Account—Loans—Interest.

1. Where a guardian of two minors admitted that a loan made by him originally belonged to the estate of one of them but that he transferred it, without order of court, to the account of the other, he was not in a position, on final settlement of the former's account, to complain of an order directing him to account to said minor for the interest earned on such loan from the date of the transfer to the date upon which it was paid.—In re Allard Guardianship, 219.

Loaning Ward's Funds—Interest.

2. A guardian who without an order of court loaned the funds of his ward on an interest-bearing note, was properly directed to account for the interest due thereon at the date of final settlement even though the ward refused to accept the note (then due) in lieu of cash.—In re Allard Guardianship, 219.

Interest—Duty of Guardian.

3. A guardian must account for all accumulations from the use of his ward's funds, and will, under no circumstances, be permitted to profit from their use.—In re Allard Guardianship, 219.

Loaning Ward's Funds—Duty of Guardian.

4. *Quaere:* Must a guardian loan his ward's money, without directions from the court to do so?—In re Allard Guardianship, 219.

Same—Liability of Guardian.

5. The rule that a guardian making a loan of his ward's funds must exercise due care is applied more strictly against a guardian who makes a loan on his own responsibility than where he makes one at the direction of the court.—In re Allard Guardianship, 219.

Compensation—When and Where not to be Allowed.

6. Section 7777, Revised Codes, providing that every guardian must be allowed such compensation for his services as the court deems just, contemplates a faithful management of the estate by the guardian, and, while a mere technical breach of duty not resulting in injury to the ward will not ordinarily justify a court in withholding compensation altogether, a flagrant violation of the duties of the trust will do so.—In re Allard Guardianship, 219.

When Compensation not to be Allowed.

7. Where a guardian not only failed for more than thirteen years to render the annual account required by statute or make any inventory, but mingled guardianship funds with his own, giving checks for large amounts of his ward's money for purposes which he was unable to disclose, the court properly denied him compensation for his services.—In re Allard Guardianship, 219.

Misconduct Justifying Removal.

8. A guardian may not mingle guardianship funds with those belonging to himself, or profit by the use of the funds of the ward, and any such officer attempting so to do should be summarily removed.—In re Allard Guardianship, 219.

Attorneys' Fees—Discretion.

9. The allowance of attorneys' fees on final settlement of a guardian's account is in the court's discretion, and its action will not be disturbed in the absence of a clear abuse thereof.—In re Allard Guardianship, 219.

HABEAS CORPUS.

Who may Suspend.

1. The suspension of the writ of *habeas corpus* is a legislative and not an executive function.—In re McDonald et al., 454.

Same—Release of Petitioner—Denial, When.

2. Where an abortive attempt to try and punish petitioner for an alleged violation of the laws of the state is shown by the record, he is not, on *habeas corpus*, entitled to his release, but must be remanded to be dealt with according to law.—In re McDonald et al., 454.

HARMLESS ERROR.

Admission of irrelevant testimony,—see Appeal and Error, 14, 16.

Denial of continuance,—see Appeal and Error, 15.

Erroneous admission of incompetent testimony at trial without a jury,—see Appeal and Error, 24.

In admission of evidence,—see Appeal and Error, 6; Evidence, 3, 18.

In submission of question of law to jury,—see Trial, 1.

HIGHWAYS.

See Streets and Highways.

HOMICIDE.
See Criminal Law, 1–3.

HORTICULTURALIST.
See State Horticulturalist.

HUSBAND AND WIFE.
See Divorce.
Letters of administration,—see Probate Proceedings, 2.

IMPLIED FINDINGS.
See Findings, 1.

INDEPENDENT CONTRACTOR.
See Personal Injuries, 5.

INDIAN RESERVATIONS.
Residence upon,—see Elections, 1, 2.

INITIATIVE AND REFERENDUM.
Validity of constitutional amendment,—see Constitution, 7–14.

INJUNCTION.
See Office and Officers, 4.
Enjoining execution sale,—see Corporations, 18 *et seq.*

INSOLVENCY.
When allegation immaterial,—see Pleading and Practice, 1.

INSTRUCTIONS.

Misrepresentations—Opinion,—see Vendor and Purchaser, 1, 2.

Assumption of Fact—Proper Refusal.

1. Where, in an action by a married woman against a corporation for services rendered by her, the question whether her husband was her agent in her dealings with defendant was in issue, a requested instruction which assumed such to have been a fact was properly refused.—Trogdon v. Hanson-Sheep Co., 1.

Personal Injuries—Aggravation of Disease—Element of Damages.

2. An instruction that the jury might consider as an element of damages the loss of strength and capacity to resist the ravages of the disease from which plaintiff's intestate was suffering at the time she was compelled to remain for ten hours at a flag station where there were not any accommodations, because of the willful refusal of defendant company's locomotive engineer to stop his train though properly flagged, was properly given.—Burles, Admr., v. Oregon Short Line R. R. Co., 129.

Homicide—Justification—Burden of Proof.

3. The burden of proof in a criminal case is never upon defendant to disprove the facts necessary to establish the crime with which he is charged; hence appellant, charged with homicide, was in no position to complain of an instruction which by failing to give the rule embodied in section 9282, Revised Codes, to the effect that the burden of proving

circumstances of mitigation, justification or excuse devolves upon defendant, impliedly told the jury that the burden did not rest upon him at any stage of the case.—State v. Halk, 173.

Sales—Retention and Use—Erroneous Instruction.

4. An instruction that retention of a machine and use for any period of time, however short, and whether reasonable or not, constitutes an acceptance, was an erroneous statement of the law, and properly refused.—Hillman v. Luzon Cafe Co., 180.

Same—Rescission—Improper Refusal of Instruction.

5. Where the defense relied on in an action to recover on a written contract of purchase of a lighting plant was in effect a rescission, an offered instruction that a party seeking such relief must act promptly upon the discovery of facts entitling him to rescind was improperly refused.—Hillman v. Luzon Cafe Co., 180.

Inapplicability to Facts—Proper Refusal.

6. The evidence having indisputably shown that plaintiff's horse was under perfect control, a requested instruction looking to the submission of the question whether the animal was unmanageable at the time of the accident was properly refused because inapplicable to the facts of the case.—Howard v. Flathead In. Tel. Co., 197.

Weight of Evidence—Singling Out Witnesses—Error.

7. While it is proper for trial courts to caution the jury that in weighing evidence they should consider the interest or bias of witnesses, made apparent by them in testifying, and credit their testimony accordingly, they may not ordinarily single out a particular witness and intimate that by reason of his interest or bias he should be regarded as discredited.—White v. Chicago, M. & P. S. Ry. Co., 419.

Same—Weight of Evidence—Discretion.

8. The district court has a wide discretion as to the extent it should go in submitting specific instructions relative to the weight the jury should accord evidence brought to their attention.—White v. Chicago, M. & P. S. Ry. Co., 419.

Statement of Issues.

9. Refusal of a requested instruction embodying a statement of the issues made in the pleadings is not reversible error where, from the charge taken as a whole, the jury could not have been mistaken as to what the issues were.—White v. Chicago, M. & P. S. Ry. Co., 419.

INSURANCE.

Automobiles—Insurance Against Theft—Criminal Intent—Burden of Proof.

1. Before plaintiff could prevail in an action to recover on a policy under the terms of which he was insured against loss by theft of his automobile, he had the burden of proving every element of the crime of larceny, including that of criminal intent in the taker to permanently deprive the owner of his property.—Valley Mer. Co. v. St. Paul F. & M. Ins. Co., 430.

Same—Evidence—Insufficiency.

2. An automobile which had been insured against damage occasioned by theft was left in a paint-shop by its owner to be repainted. Men employed in the shop appropriated it for the purpose of taking a "joy ride," during the course of which it was injured. *Held*, that the taking did not constitute larceny, in the absence of proof of a criminal intent in the takers to permanently deprive the owner of the machine of his property, and that therefore the insurer was not liable.—Valley Mer. Co. v. St. Paul F. & M. Ins. Co., 430.

INSURRECTION.

See Martial Law.

INTENT.

See Burden of Proof, 4.

INTEREST.

On funds of ward—Duty of guardian,—see Guardian and Ward.

INTERSTATE COMMERCE.

See States, 1–3.

INTOXICATING LIQUORS.

See Liquor Licenses.

ISSUES.

See Pleading and Practice, 11, 14.

Statement of, in instructions,—see Instructions, 9.

JUDGMENTS.

Abstract of judgment of justice of the peace—Effect after filing and docketing of abstract,—see Justices of the Peace, 1.

Life of lien of judgment of justice of the peace,—see Justices of the Peace, 2.

Entry—Service of Notice—Insufficiency.

1. Service of notice of entry of judgment made through the mail on an attorney whose residence was known to the clerk, *held* insufficient under *State ex rel. Cohen* v. *District Court*, 38 Mont. 119, 99 Pac. 139.—Best Mfg. Co. v. Hutton, 78.

Default Judgments—Vacation—Finding of Trial Court—Conclusive, When.

2. Where the disputed questions of fact presented by affidavits filed in support of, and in opposition to, a motion to open a default, are of such character as to leave the trial court in a more advantageous position in considering them than is the supreme court in reviewing the order granting the motion, the finding of the lower court is conclusive.—Middlefork Cattle Co. v. Todd, 259.

Failure to Enter—Dismissal—Statutes.

3. Section 6714, subdivision 6, Revised Codes, mandatory in character, providing that an action may be dismissed when the party entitled to judgment neglects to have it entered for more than six months, requires dismissal of an action, not when the party simply fails (without fault on his part) to act within time, but only when he is guilty of negligence in not acting.—Rule v. Butori, 342.

Same—Dismissal—When Error.

4. Where neither the party entitled to judgment nor his attorney, both of whom were nonresidents, knew that a decision had been rendered until after the expiration of six months, and the clerk of court not only failed in his duty to notify counsel thereof as required by a custom prevailing in his court, which was relied on by the latter, but neglected to obey the court's specific order in that regard, failure to have judgment entered within time was not cause for dismissal of the action under subdivision 6, section 6714, Revised Codes.—Rule v. Butori, 342.

JUDICIAL SALES.

Sale by sheriff of personal property under provision in chattel mortgage, *held* not judicial sale,—see Fraudulent Conveyances, 3.

JURISDICTION.

See County Commissioners; District Courts; Justices of the Peace; Martial Law; Process.

JURY.

Challenge to jury panel—Statutes—Substantial compliance necessary,—see Criminal Law, 4–6.

Erroneous submission of question of law to,—see Trial, 1.

Evidence—Preponderance—How Determined.

1. The preponderance of the evidence does not depend alone on the number of witnesses testifying to a fact; but in determining the question the jury should consider the opportunities of the witnesses for seeing or knowing the things about which they testified, their conduct and demeanor while testifying, their interest or lack of interest in the suit, and the probability or improbability of the truth of their statements in view of all the other evidence, facts and circumstances.—Burles, Admr., v. Oregon S. L. R. R. Co., 129.

JUSTICES OF THE PEACE.

Abstract of Judgment—Effect of Filing and Docketing.

1. The act of filing and docketing an abstract of a justice's judgment with the clerk of the district court, under sections 7057–7059, Revised Codes, does not convert such judgment into a final judgment of the district court, or deprive the justice of jurisdiction over it, the procedure provided for therein being merely a means by which the judgment of the latter may be made a lien upon the real estate of the losing party enforceable by execution in any county in the state.—Pierson v. Daly, 478.

Same—Life of Judgment Lien.

2. The life of a lien of a justice's judgment after filing and docketing an abstract thereof with the clerk of the district court, as provided by section 7059, Revised Codes, continues for the period of six years from the date of the judgment and not from the date of the filing and docketing.—Pierson v. Daly, 478.

Judgment—Quashing of Execution—Jurisdiction.

3. Control of its process is vested exclusively in the court upon whose authority it issues; hence the district court, in entertaining and granting a motion to quash execution of a justice's judgment issued by a clerk of the district court after an abstract thereof had been filed with and docketed by him, acted without jurisdiction.—Pierson v. Daly, 478.

LACHES.

What does not Constitute.

1. Mere delay is not sufficient ground for the imputation of laches. Parchen v. Chessman, 326.

Same.

2. One, seeking the reformation of a writing on the ground of a mutual mistake of the parties to it was not required to act until he discovered that a mistake had been made; hence where defendant did not become aware of a mistake in a renewal note until he saw a copy of it embodied in the complaint, could not be held chargeable with laches.—Parchen v. Chessman, 326.

Real Property—Assertion of Title—Estoppel.

3. Where a claimant of land permitted thirty years to elapse before he seriously attempted to enforce his claim, and during that time the value of the land had increased more than a hundred-fold, and innocent third persons, without notice of his claim, had purchased portions thereof and expended time and money in their improvement, he was estopped by laches.—Kimes v. Northern Pacific Ry. Co., 573.

LANDLORD AND TENANT.

Unlawful Detainer—Complaint.

1. The complaint in an action for unlawful detainer brought under section 7271, subdivision 1, Revised Codes, need not allege that plaintiff was entitled to the possession of the premises at the time of the commencement of the action, or gave notice, or demanded possession before bringing action.—Centennial Brewing Co. v. Rouleau, 490.

Expiration of Lease—Duty of Tenant.

2. Upon the expiration of the term of his lease, it at once becomes the tenant's duty to restore possession to his landlord, without demand or further notice.—Centennial Brewing Co. v. Rouleau, 490.

Void Lease—Status of Tenant.

3. One who enters into possession of real property under a lease rendered void by the statute of frauds, becomes a tenant at will, which tenancy may be terminated by giving the notice prescribed by section 4502, Revised Codes.—Centennial Brewing Co. v. Rouleau, 490.

Same—Repairs and Improvements by Tenant—Estoppel.

4. *Quaere:* Where tenants had entered into possession of premises after purchasing the business conducted therein from another lessor, under a lease alleged to have been made by them with the owner for a term of two years, which the latter, however, failed to sign, and thereupon made repairs and improvements upon the property, with knowledge on the part of the owner that they were doing so on the assumption that they could have the lease for two years, was the agreement binding upon the owner even though it had not been fully executed?—Centennial Brewing Co. v. Rouleau, 490.

Termination of Tenancy—Insufficient Notice.

5. A notice to a tenant that at a day named a certain person would become his landlord and that he should "take due and timely notice and act accordingly," is not such a notice as is required by section 4502, Revised Codes, to be given by a landlord for the purpose of terminating the tenancy.—Centennial Brewing Co. v. Rouleau, 490.

Unlawful Detainer—Treble Damages—Discretion.

6. Under section 7283, Revised Codes, when an unlawful detainer has been proven and damages have been awarded, the trial court has not any discretion, but must render judgment for treble the amount of the award.—Centennial Brewing Co. v. Rouleau, 490.

Same—Complaint.

7. In an action for unlawful detainer, brought under subdivision 1 of section 7271, Revised Codes, the complaint must allege specifically that the holding over by defendant is without permission of plaintiff.—Centennial Brewing Co. v. Rouleau, 490.

LAST CLEAR CHANCE DOCTRINE.

See Personal Injuries, 17, 18.

LEASES.

See Landlord and Tenant.

LIBEL AND SLANDER.

Libel—Words Actionable *Per Se*.

1. Words published concerning an officer which impute to him unfitness to perform the duties of his office or want of integrity in their discharge, are actionable *per se*.—Cooper v. Romney, 119.

Same—Construction of Language.

2–3. In determining whether a publication is libelous *per se*, the language must be considered without the aid of innuendo, and construed in its relation to the entire article in which it appears.—Cooper v. Romney, 119.

Same—"Graft"—Definition.

4. As characterizing the conduct of a public officer, the use of the word "graft" sometimes implies actual theft and always want of integrity, and its publication in this sense in a newspaper article is actionable *per se*.—Cooper v. Romney, 119.

Same.

5. *Held*, under the above rule, that a publication charging that county commissioners in letting a public printing contract did so without advertising for bids and out of favoritism, with the evident desire "to deflect all possible graft" the publisher's way, and containing a suggestion that a named amount of money was to be "cut up" between the commissioners, if false and unprivileged, was libelous *per se*.—Cooper v. Romney, 119.

Same—Malice—Privileged Publication—Actual Malice.

6. Under the Code definition of libel (Rev. Codes, sec. 3602), malice is not one of its constituents; its presence or absence becomes material only, in an action for libel, as a circumstance affording a basis for increasing and diminishing the amount of recovery, and in cases involving the question of privileged communication.—Cooper v. Romney, 119.

Same—Privileged Communication.

7. In order to found liability for libel upon a communication *prima facie* privileged, actual and not implied malice must be shown.—Cooper v. Romney, 119.

Same—Complaint—Sufficiency.

8. *Held*, that a complaint alleging that a libelous publication was false and malicious, alleges in substance that it was false and unprivileged, since, in case of malice, the privilege conferred by subdivisions 3 and 4 of section 3604, Revised Codes, does not exist.—Cooper v. Romney, 119.

LICENSES.

See Liquor Licenses; State Horticulturalist.

LIENS.

See, also, Mechanics' Liens; Mortgages.

Life of lien of justice's judgment after docketing and filing of abstract, —see Justices of the Peace, 2.

LIMITATIONS OF ACTIONS.

See Statutes of Limitations.

LIQUOR LICENSES.

Appeal to District Court—Undertaking not Required.

1. Chapter 92, Laws of 1911, provides that the protestants against the issuance of a liquor license in a place not within the corporate limits of a city or town, or the applicant therefor, may appeal to the district court, "the appeal to be taken and heard in the same manner as appeals from justice courts." *Held*, that the filing of an undertaking is not necessary to confer jurisdiction upon the district court to entertain such an appeal.—Thien v. Wiltse, 189.

Wholesale and Retail Licenses—Distinction Abolished.

2. Since the enactment of House Bill 80 (Laws 1901, p. 143), the distinction between wholesale and retail liquor licenses has been abolished, and there is now but one license to engage in the liquor business; hence the district court erred in awarding a peremptory writ of mandate commanding a county treasurer to issue to relator a license permitting him to sell liquor at wholesale.—State ex rel. Frost v. Barnett, 252.

County Commissioners—Discretion.

3. Under section 2759, Revised Codes, providing that a person who sells liquor must obtain a license "as prescribed in this Chapter," one who seeks a license to carry on the liquor business at a place outside the corporate limits of a city or town must, under section 2760 as amended, apply to the county commissioners, in whose discretion it lies whether to grant it or not.—State ex rel. Frost v. Barnett, 252.

Who may Appeal.

4. *Held*, on *certiorari*, that the right of appeal from a decision of a board of county commissioners granting a license to sell liquor in an unincorporated place notwithstanding remonstrance, can, under section 3, Chapter 35, Laws of 1913, be exercised by no less number of interested and qualified freeholders than is required in support of the petition for license, *viz.*, twenty, and that therefore an attempted appeal by one only of twenty-eight remonstrants was ineffectual to clothe the district court with jurisdiction to hear the appeal.—State ex rel. More v. District Court, 577.

Appeal—Parties—Stipulations—Jurisdiction.

5. On appeal from a decision of a board of county commissioners granting a liquor license, neither it nor any of its members was a party to the proceeding; hence a stipulation between counsel for the board and an appealing protestant, as to the facts involved, made without notice to the petitioner for license, had no binding force upon the latter, and the district court in hearing the appeal upon such stipulation acted without jurisdiction, rendering the resulting order canceling the license void.—State ex rel. More v. District Court, 577.

LIVESTOCK.

See Railroads; Sales, 7, 8, 20–22.

MANDAMUS.

See, also, Counties, 1–6; Liquor Licenses, 2; Police Officers, 1.

Motion to Quash—Order Overruling Nonappealable.

1. An order overruling a motion to quash an alternative writ of mandate is not an appealable one.—State ex rel. Frost v. Barnett, 252.

State Horticulturalist—Statutes—Conditions Impossible of Performance—Effect.

2. *Held*, that the district court erred in denying mandatory relief to a shipper of nursery stock from another state, commanding the state

horticulturalist to attach his certificate of inspection to a shipment inspected by him and found free from disease, since the requirement of section 1935 R. C. as amended, for the payment of a license fee as a condition precedent to doing business in this state, was impossible of performance, the statute not making any provision for procuring the license.—Welch v. Dean, 263.

Affidavit—Insufficiency.

3. *Mandamus* lies only to compel the performance of a clear legal duty; hence, where the affidavit for the writ did not disclose such character of duty on the part of respondent board of county commissioners, a demurrer for want of substance was properly sustained.—State ex rel. Donlan v. Board of Commissioners, 517.

Does not Lie, When.

4. The writ of mandate will not issue to compel the doing of an idle or useless thing.—State ex rel. Culbertson Ferry Co. v. District Court, 595.

MAPS.

Absence from record on appeal—Effect,—see Appeal and Error, 13.

MARRIAGE.

Remarriage of divorced persons within specified time,—see Divorce, 1.

MARTIAL LAW.

Insurrection—State Militia—Power of Governor.

1. Under section 5, Article VII, of the Constitution, the governor has authority to proclaim the existence of a state of insurrection in any portion of the commonwealth and to detail the organized militia to suppress such insurrection, and neither the local authorities nor the supreme court may interfere with his determination in the matter, so long as he remains within the limits established by the Constitution. In re McDonald et al., 454.

Same—Placing Troops in Charge of Local Authorities—Discretion.

2. When the governor deems it advisable to call the state militia into active service to suppress an insurrection in a county, he may under section 8967, Revised Codes (but need not), place the troops in charge of the local authorities.—In re McDonald et al., 454.

Same—Proclamation—Recitals—Conclusiveness.

3. The recitals in the governor's proclamation that an insurrection exists in one of the counties of the state are conclusive, and the conditions thus proclaimed must be presumed to continue until by executive order it shall be otherwise declared.—In re McDonald et al., 454.

Same—Arrest and Detention of Insurrectionists—Legality.

4. The state militia, while engaged in suppressing an insurrection pursuant to an order of the governor, may, when necessary to such suppression, arrest the insurrectionists and detain them in custody for delivery to the civil authorities at a time when the necessities of the case no longer require their detention.—In re McDonald et al., 454.

Same—Power of Governor—Limitations.

5. Though the governor may impose a degree of military rule upon a county in insurrection, he has no power to proclaim absolute martial law, which means the supremacy of the will of the military commander, the abrogation of all constitutional guaranties and state laws, and the conviction of civilians for crime by military commissions, without trial by jury.—In re McDonald et al., 454.

Same—"Insurrection"—"War."

6. *Held*, that "insurrection" and "war" are not convertible terms.—In re McDonald et al., 454.

Same—Military Courts—Unconstitutionality—Defense.

7. The possible prolongation of an insurrection is not any reason for upholding the summary trial of civilians by unconstitutional military courts, upon the argument of convenience that such course is preferable to their indefinite detention in custody.—In re McDonald et al., 454.

Same—State Militia—Statutes.

8. An Act which, upon submission to the people for their approval or rejection, is rejected, never was law for any purpose, hence the contention that the statute providing for the state militia (Rev. Codes, secs. 1045–1110) having been repealed by Chapter 145, Laws of 1911, which latter was in turn defeated on referendum, there is now no provision of law for a state militia because the defeat of Chapter 145 did not revive the original Act (Rev. Codes, sec. 122), *held* without merit.—In re McDonald et al., 454.

MASTER AND SERVANT.

Breach of contract of employment,—see Corporations, 24–28.

See, also, Personal Injuries, 1–5.

MECHANICS' LIENS.

Railroads—Notice of Lien—Sufficiency.

1. Where, from a notice of lien for materials and labor furnished in the construction of a railway roadbed, it could be ascertained that the property sought to be charged with a lien was a particular portion of the roadbed in a certain county belonging to the therein named railway company, and located "on miles 46 and 47 of the survey" of said railway company, near a given place, the notice was sufficiently specific to meet the requirements of section 7291, Revised Codes.—Dean v. Stewart, 506.

Same—Lien on Roadbed—Extent of Lien.

2. Since a mechanic's lien is primarily given upon the structure in the erection of which work was done and material furnished, it cannot be affected by a misdescription of the land upon which it stands, if the structure itself can be identified; hence a lien on a portion of a railroad roadbed, located outside a city or town, susceptible of identification, was not defeated merely because in the notice of lien the description of the roadbed covered more than one acre (Rev. Codes, sec. 7293.)—Dean v. Stewart, 506.

METROPOLITAN POLICE LAW.

See Police Officers.

MILITIA.

See Martial Law.

MISJOINDER.

Of parties and causes of action—Objection—Practice,—see Pleading and Practice, 23.

MISTAKE.

See Reformation of Instruments, 1–5.

MORTGAGES.
See Chattel Mortgages; Real Property, 2–11.

MUNICIPAL CORPORATIONS.
See Cities and Towns.

NEGOTIABLE INSTRUMENTS.
See Promissory Notes.

NEW COUNTIES.
See Counties, 1–6.

NEW TRIAL.

Equity—Insufficiency of Evidence—Conclusiveness of Findings.

1. A district judge other than the one who presided at the trial of a cause, a new trial in which is asked on the ground of insufficiency of the evidence to justify the findings, must be governed by the rule observed by the supreme court on appeal *viz.:* The findings must not be set aside unless there is a decided preponderance in the evidence against them, nor must they be disturbed when the evidence as presented by the printed record furnishes reasonable ground for different conclusions.—Gibson v. Morris State Bank, 60.

Notice of Intention—Presumptions.

2. Unless the contrary appears affirmatively from the record on appeal, the presumption obtains that the notice of intention to move for a new trial was filed in time.—Best Mfg. Co. v. Hutton, 78.

Same—When in Time.

3. Where the record on appeal did not affirmatively show that counsel for appellant was present when judgment was entered, or that it was entered before an extension of time in which to file his bill of exceptions on motion for new trial and stay of execution were asked for and granted (May 2), and the clerk of the district court on May 6, ineffectually attempted to advise him that the entry had been made two days before, and on May 15 counsel for respondent served formal notice upon him to that effect, appellant's notice of intention to move for new trial, served on May 21, *held* to have been in time (Rev. Codes, sec. 6796.)—Best Mfg. Co. v. Hutton, 78.

Same—Waiver.

4. If there was untimeliness in filing notice of intention under the circumstances detailed in paragraph 3, *supra*, it was waived by the conduct of opposing counsel in extending (on June 29) appellant's time to file his bill of exceptions, and entering into a stipulation whereby his time to propose amendments was enlarged.—Best Mfg. Co. v. Hutton, 78.

Issue of Fact—Definition.

5. A new trial is the re-examination of an issue of fact created by formal pleadings in the manner prescribed by section 6723, Revised Codes, and once tried, and does not lie under any other circumstances. State ex rel. Culbertson Ferry Co. v. District Court, 595.

Default Judgment—New Trial—Issue of Fact—*Mandamus*.

6. In an action for damages for a tort, defendant filed an answer pleading, *inter alia*, a counterclaim which required a reply. No reply having been filed, judgment by default was entered awarding defendant damages as determined by a jury, under the allegations of his counterclaim, after a hearing—in the form of a trial—participated in by counsel for both parties. Plaintiff's notice of intention to

move for a new trial was stricken from the files. *Held*, under the rules above, that *mandamus* did not lie to compel the reinstatement of the notice, inasmuch as an issue of fact not being presented by the pleadings, a new trial may not be had and the notice of intention, if reinstated, would therefor serve no useful purpose.—State ex rel. Culbertson Ferry Co. v. District Court, 595.

NONAPPEALABLE ORDERS.

See Appeal and Error, 17, 22, 25.

NONSUIT.

When improperly denied.

1. Under the rule that where the pleadings or proof show that plaintiff's own act brought about the personal injury complained of, recovery cannot be had in the absence of explanatory allegation or evidence excusing it, *held*, that a nonsuit was improperly denied where plaintiff's own testimony, while showing that when driving a horse, under complete control, one wheel of her buggy struck a guy wire placed by defendant telephone company outside the traveled portion of the highway, causing a runaway, was silent as to why she was traveling outside the traveled portion of the road at the time of the accident, whether or not she knew of the location of the wire, etc.—Howard v. Flathead Ind. Tel. Co., 197.

NOTICE.

Of elections,—see Elections.

Of entry of judgment,—see Judgment, 1.

Of intention to move for new trial,—see New Trial, 2–4.

Probate Proceedings—Hearing.

1. Section 7141, Revised Codes, providing that where written notice of a motion is necessary, it must be given five days before the time set for hearing, *etc.*, *held*, inapplicable to the trial of an issue raised by a petition for distribution of an estate and objections thereto.—In re Estate of Peterson, 96.

District Judges—Disqualification—Affidavit.

2. A party filing a disqualifying affidavit or motion for change of venue, under amended section 6315 (Chap. 114, Laws 1909), need not give notice thereof to his adversary.—State ex rel. Lohman v. District Court, 247.

Landlord and Tenant—Termination of Tenancy—Insufficient Notice.

3. A notice to a tenant that at a day named a certain person would become his landlord and that he should "take due and timely notice and act accordingly," is not such a notice as is required by section 4502, Revised Codes, to be given by a landlord for the purpose of terminating the tenancy.—Centennial Brewing Co. v. Rouleau, 490.

OBJECTIONS.

Misjoinder of parties and causes of action,—see Pleading and Practice, 23.

To evidence—Estoppel,—see Evidence, 6.

OFFER OF PROOF.

When Necessary.

1. Where an objection to evidence is sustained and it is not apparent what the answer of the witness would be, an offer of proof is necessary to entitle appellant to a review of the ruling.—Trogdon v. Hanson Sheep Co., 1.

OFFICE AND OFFICERS.

See, also, Police Officers; Libel and Slander, 1–7.

Holding more than one office,—see Police Officers, 3.

Removal for neglect of duty,—see Sheriffs, 1–6.

County Officers—Vacancies—Appointees—Tenure—Statutes—Unconstitutionality.

1. Under section 5, Article XVI, of the Constitution, declaring that the appointees to vacancies in county offices [exclusive of county attorney, clerk of district court and justice of the peace] shall hold until the next general election, *held* that section 1 of Chapter 5, Laws of 1913, which extends the tenure of such appointees "until the first Monday in January next after a general election," is invalid.—State ex rel. Rowe v. Kehoe, County Clerk, 582.

Same—Vacancies—Power to Fill.

2. Though the general power lodged in the board of county commissioners to fill vacancies in county offices must be narrowly construed, yet in case of a vacancy in an office the filing of which is not specifically provided for, the board should exercise its power in order to prevent as interregnum in the office and the consequent suspension of the public business.—State ex rel. Rowe v. Kehoe, County Clerk, 582.

Same—Vacancies—Duty of County Commissioners.

3. *Held*, under sections 451, 453 and 455, Revised Codes, that in case of vacancies in county offices, boards of county commissioners have the power, and it is their duty, to call and provide for the holding of special elections to fill them.—State ex rel. Rowe v. Kehoe, County Clerk, 582.

Same—Special Elections—Proclamation and Notice—Ballots—Injunction.

4. *Held*, on application for injunction, that where the board of county commissioners had failed to proclaim and give notice of a special election to fill a vacancy caused by the removal of a sheriff, to be held on the day a general election was to take place, the county clerk was without authority to place upon the ballot the name of any candidate for the election to fill such vacancy.—State ex rel. Rowe v. Kehoe, County Clerk, 582.

ORDERS.

Nonappealable,—see Appeal and Error, 17.

ORDINANCES.

Force and effect,—see Cities and Towns, 1.

PARTIES.

See, also, Corporations, 2.

Litigious character,—see Evidence, 3, 5.

Misjoinder,—see Pleading and Practice, 23.

To suit for injunction to restrain execution sale of corporate property,—see Corporations, 18, 23.

To appeal from action of boards of county commissioners on petitions for liquor licenses,—see Liquor Licenses, 5.

PARTNERSHIP.

Essentials.

1. To constitute an association of two or more persons a copartnership within the meaning of section 5466 Revised Codes, it must be the intention of the parties to carry on some business and to share in the profits, community of interest alone—without power in each member

of it to act toward the other in the interchangeable character of principal and agent—being insufficient to create the relationship of copartners.—Croft v. Bain, 484.

Evidence—Insufficiency.

2. The bare statement made on the witness-stand by one of a number of persons who jointly bought a stallion, giving their joint and several promissory notes to secure the purchase money, that "there was an association formed among the signers of the notes and those who signed the notes were owners of the shares," was, in the absence of other facts and circumstances disclosing the intention of the parties, insufficient to show the existence of a copartnership; *i, e.*, that the animal was bought for the purpose of hiring for breeding purposes to members of the public for the mutual profit of the purchasers.—Croft v. Bain, 484.

Fictitious Name—Disability to Sue—Affirmative Showing Necessary.

3. The disability to maintain certain actions, imposed by section 5505, Revised Codes, upon partners doing business under a fictitious name, because of failure to file the certificate required by the preceding section, must be affirmatively shown,—a requirement not met by the statement of one copartner to the effect that, so far as he knew, his firm had not complied with the provision of section 5504.—Croft v. Bain, 484.

Contribution—Actions at Law.

4. While a member of a copartnership may not, until an accounting has been had, maintain an action at law against a copartner to recover a balance alleged to be due him on account of transactions arising out of the copartnership, such an action may be prosecuted by an obligor against his co-obligor to compel reimbursement to plaintiff in the latter's proportionate share of the common obligation discharged by him.—Croft v. Bain, 484.

PERSONAL INJURIES.

Injunction to restrain sale of corporate property to satisfy judgment in action for personal Injuries,—see Corporations, 15–23.

Master and Servant—Coal Mines—"Working Place"—Definition.

1. Plaintiff coal miner was injured by the fall of a rock from the roof of a tunnel about seventy feet distant from the place where he had been actively engaged in mining coal and while on his way to secure an empty car for loading. Section 83 of the Coal Mining Code (Laws 1911, Ch. 120) imposes on the miner the duty to inspect and keep safe his "working place." *Held*, that plaintiff's working place, within the meaning of that Act, at the time of his injury, was the place where he was about to load the coal previously blasted down by him, and not the place in the tunnel where the accident occurred which latter, having been turned over to defendant about three weeks before, had become a traveling way—an appliance for plaintiff's use—which it was the duty of defendant's foreman to inspect.—McInnes v. Republic Coal. Co., 112.

Same—Assumption of Risk.

2. The risk arising from defendant's failure to discharge its duty to exercise reasonable care to make the tunnel in which plaintiff was injured, a reasonably safe place and to maintain it in that condition, was not one of those the latter assumed, in the absence of evidence that though the danger was obvious he nevertheless, with knowledge of it and appreciation of the risk attending it, and without any assurance from the master that the defect would be remedied, continued to use the way.—McInness v. Republic Coal Co., 112.

Same—Assumption of Risk—Inapplicability of Doctrine.

3. The evidence disclosing that sounding was necessary to detect loose rocks in the roof of a coal mine tunnel used as a passageway

by the miners, the fact that plaintiff made a visual examination of the place where he was hurt and found it safe was not sufficient to charge him with assumption of the risk incident to falling rock at that place.—McInness v. Republic Coal Co., 112.

Same—Question of Law—Erroneous Submission—Harmless Error.

4. The submission of the question whether the place where plaintiff was injured was within his working place, if error, was harmless where the court, under the evidence, might properly have instructed them that it was not,—a conclusion arrived at by their general verdict in his favor.—McInness v. Republic Coal Co., 112.

Same—Independent Contractor.

5. A coal miner who, though paid at a certain rate per ton or yard of coal extracted by him, was required to obey the rules and directions of the defendant company, was an employee and not an independent contractor.—McInness v. Republic Coal Co., 112.

Railroads—Flag Stations—Refusal to Stop Train—Exemplary Damages.

6. In an action against a railway company to recover damages for failure to stop its train at a station where it was scheduled to stop when flagged, punitive, in addition to compensatory, damages may be awarded if it is shown that the engineer saw the signal but willfully refused to stop for the purpose of receiving plaintiff as a passenger.—Burles, Admr., v. Oregon Short Line R. R. Co., 129.

Same—Aggravation of Disease—Element of Damages—Instructions.

7. An instruction that the jury might consider as an element of damages the loss of strength and capacity to resist the ravages of the disease from which plaintiff's intestate was suffering at the time she was compelled to remain for ten hours at a flag station where there were not any accommodations, because of the willful refusal of defendant company's locomotive engineer to stop his train though properly flagged, was properly given.—Burles, Admr., v. Oregon Short Line R. R. Co., 129.

Same—Damages—Evidence.

8. Evidence that there were not any accommodations at a flag station at which an invalid passenger was compelled to remain for about ten hours owing to the wrongful refusal of defendant company's engineer to stop his train, was admissible as reflecting upon the probability of plaintiff's claim that she underwent suffering in consequence of being forced to wait at such a place.—Burles, Admr., v. Oregon Short Line R. R. Co., 129.

Same—Evidence—*Res Gestae.*

9. Evidence that the invalid passenger referred to in paragraph 8 above manifested her suffering by moaning during the tedious wait for the next train, was properly admitted.—Burles, Admr., v. Oregon Short Line R. R. Co., 129.

Negligence—Liability—Proximate Cause.

10. To establish the liability of defendant for personal injuries, it must not only appear that he was negligent, and that the plaintiff was injured, but also that his negligence was the proximate cause of the injury.—Howard v. Flathead Independent Tel. Co., 197.

Highways—Duty of Traveler.

11. Where a sufficient portion of a highway is made suitable for travel, the invitation to the public to use it is confined to the prepared or used portion; and for injuries received outside thereof a traveler cannot recover unless he can excuse his presence at the place where he was injured.—Howard v. Flathead Independent Tel. Co., 197.

Same—Nonsuit—Improper Denial.

12. Under the rule that where the pleadings or proof show that plaintiff's own act brought about the personal injury complained of, re-

covery cannot be had in the absence of explanatory allegation or evidence excusing it, *held*, that a nonsuit was improperly denied where plaintiff's own testimony, while showing that when driving a horse, under complete control, one wheel of her buggy struck a guy wire placed by defendant telephone company outside the traveled portion of the highway, causing a runaway, was silent as to why she was traveling outside the traveled portion of the road at the time of the accident, whether or not she knew of the location of the wire, *etc.*—Howard v. Flathead Independent Tel. Co., 197.

Same—Instructions—Inapplicability to Facts—Proper Refusal.

13. The evidence having indisputably shown that plaintiff's horse was under perfect control, a requested instruction looking to the submission of the question whether the animal was unmanagable at the time of the accident was properly refused because inapplicable to the facts of the case.—Howard v. Flathead Independent Tel. Co., 197.

Corporations—Creditors—Definition.

14. An employee of a mining company became its creditor on the day on which a cause of action for personal injuries accrued in his favor.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Pleadings and Proof—Admission of Irrelevant Testimony—Harmless Error.

15. Error in admitting evidence bearing upon defects in the braking appliances and the competency of the engineer in charge of the locomotive attached to the train on which plaintiff switchman was injured, because irrelevant to the issue which was whether the engineer was negligent in moving the train in defiance of a stop signal, *held* to have been rendered harmless by instructions clearly stating the question at issue and that plaintiff could recover only upon proof of the negligence alleged, and not upon proof of any other.—White v. Chicago, M. & P. S. Ry. Co., 419.

What not Excessive Verdict.

16. *Held*, that a verdict in the sum of $15,000 in favor of a trainman, thirty years of age at the time of the accident and earning $2,100 per annum, for the loss of his left arm below the elbow, was not so large as to force the conclusion that in making the award the jury were influenced by passion and prejudice, rendering a new trial necessary.—White v. Chicago, M. & P. S. Ry. Co., 419.

Street Railways—Duty Toward Travelers on Streets—Last Clear Chance.

17. It is the duty of a street railway company, through its agents, to exercise constant care and watchfulness to avert injury to travelers on streets traversed by its cars, even though the latter are heedless of their surroundings and thus place themselves in danger; hence an allegation in plaintiff's complaint that while oblivious of her surroundings she unconsciously put herself in peril by driving directly in the way of one of defendant's car, did not alone relieve defendant company of liability or conclude plaintiff's right to recover; the question in such case being whether the person in charge of the car exercised the proper care to discover the peril of the traveler and promptly made use of all available appliances to avoid injurying him.—Cole v. Helena L. & Ry. Co., 443.

Same—Evidence—Insufficiency.

18. Where liability for a personal injury was attempted to be fastened upon defendant street railway company on the theory that its motorman, having had the last clear chance to avoid injurying plaintiff, was guilty of want of attention, and the evidence left his dereliction in this respect open to speculation, a directed verdict for defendant was proper.—Cole v. Helena L. & Ry. Co., 443.

Same—Refusal to Reopen Case—When not Error.

19. Refusal to reopen plaintiff's case after defendant's motion for a directed verdict, *held* not to have been error, where additional tes-

timony sought to be introduced would not have so strengthened his case as to require its submission to the jury.—Cole v. Helena L. & Ry. Co., 443.

PERSONAL PROPERTY.

See Fraudulent Conveyances, 2, 3; Sales, 1-22.

PLEADING AND PRACTICE.

Purchasing testimony—Public policy,—see Attorneys, 4.

Corporations—Officers—Misappropriation of Funds—Insolvency—Pleading.

1. The right of minority stockholders to require the officers, to whom has been intrusted the control of the affairs of the corporation, to account for money and funds misappropriated by them, does not depend upon whether the corporation is insolvent or likely to become so; hence omission to allege insolvency was immaterial.—Kleinschmidt v. American Mining Co., Ltd., 7.

Complaint—Sufficiency—How Determined.

2. A complaint will be sustained, as against attack on the ground of insufficiency to state a cause of action, if under the facts alleged plaintiff is entitled to relief from any point of view.—Hicks v. Rupp, 40.

Cancellation—Complaint—Contents.

3. To invoke the jurisdiction of a court of equity in a suit looking to the cancellation of an instrument (a contract of sale of real property, in the case at bar), it was necessary for plaintiff to allege that the instrument was of such a character that, if left outstanding, it would be a menace to his title, or probably imperil it.—Hicks v. Rupp, 40.

Same—Complaint—Sufficiency.

4. Complaint, though insufficient to invoke the equity power of the court to cancel an instrument said to cast a cloud upon plaintiff's title, *held* sufficient to state a cause of action at law to recover, as damages, the value of personal property delivered to defendants under a contract of sale of ranch property including said personalty, as well as of the use and occupation of the land during the period it was in their possession.—Hicks v. Rupp, 40.

Mandamus—Existence of Office—Affidavit—Sufficiency.

5. In the absence of special demurrer, or motion to make more specific, the existence of the office to which plaintiff sought restoration was sufficiently stated by the allegation in the affidavit for the writ of *mandamus* that he was appointed to the office of lieutenant of police of the police department of the city of B., a permanent, existing office, created under the rules and regulations of the department promulgated by the city council and under authority of the statute.—State ex rel. Dwyer v. Duncan, Mayor, 54.

Pleadings—Evidence—Objection—Estoppel.

6. Defendant mayor was estopped to object to the introduction in evidence of an ordinance, the existence of which he himself pleaded in his answer.—State ex rel. Dwyer v. Duncan, Mayor, 54.

Breach of Warranty—Pleading—Counterclaims.

7. A breach of warranty not waived may be pleaded by way of counterclaim to an action on the purchase price, but cannot (with certain exceptions) be relied on as a defense, after acceptance and retention with knowledge of the breach.—Best Mfg. Co. v. Hutton, 78.

Probate Proceedings—Hearing—Notice.

8. Section 7141, Revised Codes, providing that where written notice of a motion is necessary, it must be given five days before the time set for hearing, *etc.*, *held* inapplicable to the trial of an issue raised

by a petition for distribution of an estate and objections thereto.—In re Estate of Peterson, 96.

Complaint—Sufficiency—Inferences.

9. Whatever is necessarily implied in, or reasonably to be inferred from, an allegation, is to be taken as directly averred.—Willoburn Ranch Co. v. Yegen, 101.

Pleading—Estoppel.

10. Where, in an action to compel a reconveyance of certain trust property on the ground that the purposes of the trust had been fully accomplished, defendant in his answer recognized the original contract by which the trust was created and the property conveyed as valid, but set up title to the property by virtue of a subsequent contract, he could not thereafter contend that the original contract was void because not in writing.—Willoburn Ranch Co. v. Yegen, 101.

Corporate Capacity—General Denial—Insufficiency.

11. A general denial did not put in issue the corporate capacity of plaintiff.—Willoburn Ranch Co. v. Yegen, 101.

Libel—Complaint—Sufficiency.

12. *Held*, that a complaint alleging that a libelous publication was false and malicious, alleges in substance that it was false and unprivileged, since, in case of malice, the privilege conferred by subdivisions 3 and 4 of section 3604, Revised Codes, does not exist.—Cooper v. Romney, 119.

Quieting Title—Complaint—Insufficiency.

13. Complaint in an action by a railway company to quiet title to land claimed by it as part of its right of way, *held* insufficient to state a cause of action under section 6870, Revised Codes, for failure of an allegation that defendant asserted a claim to any portion of the right of way, adverse to plaintiff.—Northern Pac. Ry. Co. v. Hauswirth, 135.

Insufficiency to Raise Issue.

14. The averment in defendant's answer that plaintiffs had represented that a lighting machine "could be run at a given expense for a given length of time" was insufficient to raise an issue so as to admit evidence of a representation that the plant was capable of furnishing light for defendant's establishment at an operating cost of not to exceed a certain sum per month, whereas the actual cost was double that amount.—Hillman v. Luzon Cafe Co., 180.

Sales—Counterclaim—Insufficiency.

15. Counterclaim for the return of the purchase money paid for a machine, *held* obnoxious to the rule that the matter alleged must tend to diminish or defeat plaintiff's recovery, and must constitute a cause of action complete within itself.—Hillman v. Luzon Cafe Co., 180.

Pleadings—Amendments—Leave of Court.

16. After a cause is at issue and has been set for trial, defendant may not file an amended answer as a matter of right under section 6588, Revised Codes, but must obtain permission of the trial court to do so, pursuant to the provisions of section 6589.—Meredith v. Roman, 204.

Same.

17. Section 6579, Revised Codes, which confers upon district courts the power to adjust the rights of codefendants *inter sese*, does not permit the adjustment of such rights in a case in which their claims are wholly independent of, and not in any way connected with, those of plaintiff, nor give the defendants the right to file new or amended pleadings irrespective of the requirements of section 6589.—Meredith v. Roman, 204.

Same—Excusable Delay—Effect.

18. Delay in filing an amended answer, occasioned by negotiations looking to a settlement of a controversy, did not authorize its filing without

permission of court after the expiration of the time within which an amended pleading may be filed as a matter of right.—Meredith v. Roman, 204.

Same—Striking Amended Pleading.

19. Where the trial court could properly have stricken an amended pleading as a whole because filed without leave of court, it did not commit error in striking portions of it.—Meredith v. Roman, 204.

Continuance—When to be Granted.

20. A continuance ought to be granted whenever the facts shown upon the application therefor would authorize the court, under section 6589, Revised Codes, to relieve a party from a judgment, order or other proceeding taken against him through his mistake, surprise or excusable neglect.—Meredith v. Roman, 204.

Same—Stipulation—What Does not Constitute.

21. Correspondence between opposing counsel examined and *held* not to have constituted a stipulation for the postponement of a trial, so as to have been binding upon respondent.—Meredith v. Roman, 204.

Same—Denial—Harmless Error.

22. Denial of an application of a continuance on account of the absence of witnesses, if error, *held* harmless, where opposing counsel admitted that, if present, they would testify to the facts which the applicant stated in his affidavit for the postponement he expected to prove by them, and where it further appeared that they had no personal knowledge of the transaction at issue.—Meredith v. Roman, 204.

Misjoinder of Parties and Causes of Action—Objection—Practice.

23. The point that the complaint discloses a misjoinder of parties or that causes of action are improperly united may not be raised by objection to the introduction of evidence, but must be taken advantage of by special demurrer, else the right to object is waived.—Meredith v. Roman, 204.

Brokers—Fraud—Complaint—Sufficiency.

24. *Held*, that a complaint alleging that plaintiff employed defendant to sell land for a certain sum at a given commission; that defendant falsely represented to plaintiff that in order to effectuate a sale the selling price would have to be lowered; that this was believed by plaintiff who thereupon executed a deed for such reduced consideration; that at the time such representation was made defendant had negotiated a sale at the price originally fixed; that plaintiff was thus defrauded out of the difference between the original selling price and the amount actually received by him; and that he had made demand upon defendant for restitution but had been refused,—was sufficient to constitute a cause of action.—Middlefork Cattle Co. v. Todd, 259.

Equity—Counterclaim—Pleading—Sufficiency.

25. In a suit in equity, affirmative matter pleaded as a counterclaim, if sufficient in substance to warrant denial of relief to the plaintiff or to require the imposition of conditions to the granting of the same, will, though defective in form, support a decree.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Corporations—Nonconsenting Creditors—Pleading—Sufficiency.

26. An allegation that an employee who had secured a judgment for personal injuries against a mining company had no knowledge of the proceedings leading up to an alleged fraudulent sale of its property and did not assent to them, *held* a sufficient statement that he was a nonconsenting creditor.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Equity—Equitable Defense—Pleading.

27. In a suit in equity, the mere pleading of an equitable defense, as such. will authorize the granting of whatever affirmative relief the

pleader shows himself entitled to, consistent with his pleadings and without regard to his prayer.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Pleading—Surplusage.

28. Where the answer, in a suit to enjoin an execution sale, alleged facts showing that the purchase by plaintiff of property of the judgment debtor was fraudulent in law, allegations that the purchase was fraudulent in fact, which were not supported by the evidence, were properly disregarded as surplusage.—Pittsmont Copper Co. v. O'Rourke, Sheriff, 281.

Fraud—Fraud in Law—Pleading and Proof.

29. Charges of actual fraud cannot be established by proof of fraud in law.—Pittsmont Copper Co. v. O'Rourke, 281.

Complaint—Demurrer—Matters of Form to be Disregarded.

30. In determining a general demurrer to a complaint, matters of form as well as allegations not appropriate to the purpose sought to be attained will be disregarded; and if, upon any view, the plaintiff is entitled to relief, the pleading must be sustained.—Wheeler & Motter Mer. Co. v. Moon, 307.

Same—Inferences—Sufficiency.

31. Whatever is necessarily implied in, or to be inferred from, a complaint, is to be deemed directly alleged.—Wheeler & Motter Mer. Co. v. Moon, 307.

Same—Ambiguity—General Demurrer.

32. Ambiguity in a complaint cannot be reached by a general demurrer. Wheeler & Motter Mer. Co. v. Moon, 307.

Complaint—Insufficiency—Appeal—Affirmance of Judgment, When.

33. If the complaint in a case in which defendant prevailed does not state a cause of action, he is entitled to an affirmance of the judgment, irrespective of the merits of plaintiff's contentions on appeal.—Cole v. Helena L. & Ry. Co., 443.

Trial—Practice—Reopening Case—Discretion.

34. After a case has been closed, the matter of reopening it for the introduction of further evidence is within the discretion of the trial court, and unless there has been a clear abuse of it, its ruling thereon will not be disturbed on appeal.—Cole v. Helena L. & Ry. Co., 443.

Unlawful Detainer—Complaint.

35. The complaint in an action for unlawful detainer brought under section 7271, subdivision 1, Revised Codes, need not allege that plaintiff was entitled to the possession of the premises at the time of the commencement of the action, or gave notice, or demanded possession before bringing action.—Centennial Brewing Co. v. Rouleau, 490.

Same.

36. In an action for unlawful detainer brought under subdivision 1 of section 7271, Revised Codes, the complaint must allege specifically that the holding over by defendant is without permission of plaintiff.—Centennial Brewing Co. v. Rouleau, 490.

POLICE OFFICERS.

Mandamus—Existence of Office—Affidavit—Sufficiency.

1. In the absence of special demurrer, or motion to make more specific, the existence of the office to which plaintiff sought restoration was sufficiently stated by the allegation of the affidavit for the writ of *mandamus* that he was appointed to the office of lieutenant of police of the police department of the city of B., a permanent existing office, created under the rules and regulations of the department promulgated

by the city council and under authority of the statute.—State ex rel. Dwyer v. Duncan, Mayor, 54.

Removal of Officers—Violation of Statute.

2. *Held*, under the Metropolitan Police Law (Rev. Codes, secs. 3304–3317) that the act of defendant mayor and city council in retiring a lieutenant of police to the eligible list, on the ground of economy, and immediately thereafter appointing another to fill the same office, was a violation of the civil service principle of that statute and did not deprive plaintiff of his office.—State ex rel. Dwyer v. Duncan, Mayor, 54.

Restoration to Office—Waiver—Defense not Available, When.

3. Though one office is vacated by the incumbent accepting another and incompatible one, since it is against public policy that the duties of more than one office which are inconsistent and incompatible should be performed by one person, defendant mayor was not in position to raise the point that plaintiff waived the right to be restored to the office of lieutenant of police by accepting temporarily, pending proceedings for restoration, an appointment as deputy county inspector of weights and measures.—State ex rel. Dwyer v. Duncan, Mayor, 54.

POLICE POWERS.

See States, 2, 3.

POWERS.

Of governor in suppressing insurrection,—see Martial Law.

Of municipal corporations,—see Cities and Towns, 5, 6.

PRESUMPTIONS.

New Trial—Notice of Intention.

1. Unless the contrary appears affirmatively from the record on appeal, the presumption obtains that the notice of intention to move for a new trial was filed in time.—Best Mfg. Co. v. Hutton, 78.

Trial by Court—Evidence—Erroneous Admission.

2. Where a trial is had by the court without the aid of a jury, the presumption obtains that, if incompetent testimony was admitted, it was disregarded by the court in arriving at its conclusion.—State v. Driscoll, 558.

General and Special Elections—Notice.

3. While electors are conclusively presumed to know the time for holding general elections as well as what officers are to be elected, they may not be charged with knowledge of the fact that a vacancy has occurred which they may fill on the same day a general election takes place.—State ex rel. Rowe v. Kehoe, County Clerk, 582.

PRINCIPAL AND AGENT.

See, also, Brokers; Corporations.

PROBATE PROCEEDINGS.

See, also, Guardian and Ward; Attorneys.

Wills — Pretermission of Children — Intention of Testator — Evidence—Admissibility.

1. Under Revised Codes, section 4755, providing that, where a testator omits to provide in his will for any of his children, unless it appears that such omission was intentional, such child must have the

same share in the estate as if testator had died intestate, *etc.*, evidence *dehors* the will may be received to ascertain whether the omission was intentional.—In re Estate of Peterson, 96.

Husband and Wife—Letters of Administration—Who Entitled Thereto.

2. The surviving husband or wife is, under section 7432, Revised Codes, entitled to letters of administration to the exclusion of any other person unless one of the grounds of incompetency enumerated in section 7436 is shown to exist.—State ex rel. Cotter v. District Court, 146.

Same—Special Administrators—Preference to Appointment.

3. In the absence of a showing of incompetency, the person who is entitled to letters testamentary or of administration must be given the preference in the selection of a special administrator.—State ex rel. Cotter v. District Court, 146.

PROCESS.

Control of, in What Court.

1. Control of its process is vested exclusively in the court upon whose authority it issues.—Pierson v. Daly, 478.

PROHIBITION.

See Elections, 2.

PROMISSORY NOTES.

Waiver of benefit of statute of limitations,—see Statutes of Limitation, 1–3.

PUBLIC POLICY.

How Determined.

1. What constitutes the public policy of a state and what is contrary to it are questions to be determined by reference to its legislative enactments, and, in their absence, to the decisions of its courts.—Parchen v. Chessman, 326.

Promissory Notes—Statute of Limitations—Waiver.

2. *Held*, that a stipulation embodied in a promissory note, to the effect that the maker expressly waives all rights and benefits conferred by the statute of limitations, is not void as against public policy.—Parchen v. Chessman, 326.

Attorneys—Purchasing Testimony.

3. *Held*, as a matter of public policy, that an attorney is never justified in buying testimony, even though true.—In re O'Keefe, 369.

PURCHASERS FOR VALUE.

See Corporations, 21.

QUANTUM MERUIT.

See Work and Labor, 1.

QUIETING TITLE.

Complaint—Insufficiency.

1. Complaint in an action by a railway company to quiet title to land claimed by it as part of its right of way, *held* insufficient to state a cause of action under section 6870, Revised Codes, for failure of an allegation that defendant asserted a claim to any portion of the right of way, adverse to plaintiff.—Northern Pac. Ry. Co. v. Hauswirth, 135.

QUITCLAIM DEEDS.

See Real Property, 1.

RAILROADS.

See, also, Mechanics' Liens; Personal Injuries; Street Railways.

Carrier and passenger,—see Personal Injuries, 6–9.

Quieting title to portion of right of way,—see Quieting Title, 1.

Carriers of Freight—Nature of Liability.

1. The rule which relieves a common carrier, as such, from liability for injury to goods, upon placing the cars where they can be conveniently unloaded by the consignee, does not relieve from all liability but merely changes the liability from that of carrier to that of warehouseman. (Rev. Codes, sec. 5311.)—Gary Bros. & Gaffke Co. v. Chicago, M. & P. S. Ry. Co., 524.

Same—Contract of Carriage—Liability Thereunder.

2. Where, under a contract of carriage as indorsed on the bill of lading the consignee of a shipment of potatoes had forty-eight hours after notice of their arrival at destination within which to remove them before defendant railway company's liability as carrier ceased, and the potatoes were not removed within that time but froze in the cars, it was answerable for the consequent damage under its liability as thus fixed.—Gary Bros. & Gaffke Co. v. Chicago, M. & P. S. Ry. Co., 524.

RATIFICATION.

Of unauthorized act of directors,—see Corporations, 9.

REAL PROPERTY.

See, also, Statutes of Limitations.

A bridge is real property,—see Bridges, 3.

Sale—Fraud—Misrepresentations,—see Vendor and Purchaser, 1, 2.

Quitclaim Deeds—Title Acquired.

1. One who, though paying full value, accepts a quitclaim deed, takes such title only as his grantor had.—Gibson, Admx., v. Morris State Bank, 60.

Mortgages—Absolute Conveyance—Evidence.

2. Evidence *held* to clearly preponderate against the finding of the trial judge that a deed, given by the owner of land to a bank to which he was heavily indebted, was intended to be absolute and not as a further security for the debt as contended by the debtor.—Gibson, Admx., v. Morris State Bank, 60.

Same—Form—Absolute Conveyance.

3. Where a deed absolute in form is given by a debtor to his creditor, and the indebtedness remains uncanceled, the conveyance is treated in equity as a mortgage.—Gibson, Admx., v. Morris State Bank, 60.

Same—Burden of Proof—Character of Instrument.

4. The burden which is upon him who alleges that an absolute deed is a mortgage to establish that fact by clear and convincing evidence, is sustained by showing that the debt for which the conveyance was executed remains uncanceled and is treated as an existing indebtedness. Gibson, Admx., v. Morris State Bank, 60.

Same—Character of Instrument—Retention of Evidence of Indebtedness—Effect.

5. Where an absolute deed is given by a debtor to his creditor, and it appears that the antecedent debt has been canceled, the retention of the evidence of the debt by the grantee may be explained, but, if the indebtedness is not canceled and proceedings are instituted to enforce it, no explanation can avoid the conclusion that the deed was

security only and not an absolute conveyance.—Gibson, Admx., v. Morris State Bank, 60.

Same—Conveyance by Mortgagor to Mortgagee—Effect.

6. As between the parties to a real estate mortgage, a deed to the property by the mortgagor to the mortgagee does not of itself extinguish the lien, the result of such a transaction depending upon the intention with which it was made, which may be shown by the recitals in the instrument or by a separate agreement in writing, or may be ascertained from parol evidence of the circumstances accompanying the transaction.—Dubbels v. Thompson, 550.

Same—Extinguishment of Lien—Statutes.

7. *Semble:* It would seem from the language of section 5727, Rev. Codes, that in order to be effective to extinguish a mortgage lien through the agency of a sale of the property to the mortgagee, it must be made for that purpose and the conveyance must disclose such fact.—Dubbels v. Thompson, 550.

Same—Conveyance to Mortgagee—Duty of Purchaser from Latter.

8. Where title to realty is acquired by deed from a mortgagor to the mortgagee, not expressing the purpose of it, the person taking from the latter is bound at his peril to ascertain whether the conveyance from the mortgagor to the mortgagee was intended as a final adjustment of their rights.—Dubbels v. Thompson, 550.

Same—Conveyances—Title—Estoppel.

9. Where a mortgagee by warranty deed mistakenly reconveyed to the mortgagor the mortgaged property after transfer to him by the latter, thus enabling his grantee to convey title to a third person, he was estopped to assert that such third person was bound at his peril to ascertain whether his mortgage lien had been extinguished.—Dubbels v. Thompson, 550.

Same—Deeds—Validity—Burden of Proof.

10. One who attacks the validity of a duly executed deed has the burden of proof.—Dubbels v. Thompson, 550.

Same—Fraudulent Conveyances—Burden of Proof.

11. T. executed to D. a mortgage upon real property. On default of payment of the note to secure which it was given, T. by warranty deed transferred the property to D., who did not formally release the mortgage. D. later mistakenly reconveyed to T., who knew nothing of this conveyance until delivery of it to him by the clerk after recording. T. thereafter transferred to his father, a nonresident, who was not shown to have had any knowledge of the transfer to him. In a suit by D. to foreclose the mortgage, evidence *held* to disclose that the latter transaction was fictitious, and that in the absence of any evidence on the part of T.'s father in explanaion of it, a judgment in his favor was erroneous.—Dubbels v. Thompson, 550.

RECEIVERS.

Premature appeal,—see Corporations, 5.

Appointment—Insufficient Showing.

1. Receivership is an extraordinary remedy, never to be allowed except upon a showing that it is necessary; and such a showing was not made by mere insolvency, nor by conduct on defendant company's part the result of which might be a forfeiture of its corporate rights. Prudential Securities Co. v. Three Forks etc. R. Co., 567.

Improper Appointment—Attachment—Execution.

2. The complaint alleged that plaintiff's claim was less than $2,500 and that defendant company's property was worth about $40,000,

against which liens were filed to the amount of about $30,000 more than a year before the commencement of this action; there was no allegation that any suits had been brought to enforce such liens; *held*, a receiver was improperly appointed under the rule that a receivership is not allowed where the party asking for it has or may have an attachment or execution.—Prudential Securities Co. v. Three Forks etc. R. Co., 567.

RECORD ON APPEAL.

Defective,—see Appeal and Error, 12.

REFORMATION OF INSTRUMENTS.

Mistake—When Reformation Decreed.

1. Where the parties to a contract agree upon the terms and conditions thereof and through mutual mistake the writing signed by them fails to express their agreement, or includes terms and conditions not agreed upon, a court of equity will reform it.—Parchen v. Chessman, 326.

Failure to Read Before Signing—Effect.

2. Though, generally speaking, failure of a party to read an instrument before signing it, will preclude relief by way of reformation, it will be granted when neglect in this behalf is excusable, and when, in view of all the circumstances, denial of it would permit one party to inflict a gross wrong upon the other.—Parchen v. Chessman, 326.

Same—Mistake of Scrivener.

3. Where the parties to the renewal of a promissory note intrusted the duty of formulating the writing to a scrivener, who mistakenly embodied in it a stipulation that the maker waived the benefit of the statute of limitations, the latter could have it reformed even though he signed and delivered it without reading it.—Parchen v. Chessman, 326.

Same.

4. One, seeking the reformation of a writing on the ground of a mutual mistake of the parties to it was not required to act until he discovered that a mistake had been made; hence where defendant did not become aware of a mistake in a renewal note, until he saw a copy of it embodied in the complaint, could not be held chargeable with laches.—Parchen v. Chessman, 326.

Prior Demand for Correction of Mistake—When Unnecessary.

5. Demand by defendant upon plaintiff to correct the mistake in the writing before asking for reformation thereof, *held* to have been an unnecessary and idle ceremony under the circumstances of the case, the performance of which the law does not require.—Parchen v. Chessman, 326.

REMEDIES.

Sales—Breach of Warranty.

1. The purchaser of a stallion under a bill of sale warranting that the animal could be returned and exchanged for another in case the first failed to meet the warranty, was not restricted to the remedy provided in the bill but could, upon refusal of the seller to take back the animal, or failure to offer a substitute acceptable to the buyer, maintain his action to recover the purchase price.—Sutherland v. Green, 379.

REOPENING CASE.

See Pleading and Practice, 34.

REPLEVIN.
See Claim and Delivery.

RESCISSION.
See Sales, 8, 16.

RES GESTAE.
See Evidence, 9.

RESIDENCE.
See Elections, 3, 4.

ROBBERY.
See Criminal Law, 7–9.

RULES.

Of district courts,—see District Courts, 3–5.

Of supreme court—Defective record in equity cases,—see Appeal and Error, 13.

SALES.

Acceptance—Waiver of Defects.

1. Where plaintiff agreed to furnish defendant a traction outfit of a certain character and capacity, and the latter contracted, *inter alia*, that continuous use of it for twenty days, or at intervals during that time, should constitute an acceptance waiving all claims for damages, *etc.*, and on receipt thereof the former not only used it himself at intervals during three years for two-thirds of which time he was aware that it did not and could not be made to meet warranties made by the seller, but hired it out and received money for its use and paid part of the purchase price, his acceptance of it was complete.—Best Mfg. Co. v. Hutton, 78.

Same.

2. While an acceptance does not ordinarily waive a breach of warranty, an express stipulation that acceptance should constitute a waiver "of all claims for damages, either upon express or implied warranty," was conclusive, unless in turn waived by the seller.—Best Mfg. Co. v. Hutton, 78.

Same—Waiver—Validity of Stipulation.

3. *Held*, that the provision in a contract of sale of certain machinery to the effect that twenty days' use should constitute an acceptance and waiver of deficiencies, is neither void as a stipulation for liquidated damages (Rev. Codes, sec. 5054) nor obnoxious as a restriction upon the right to have one's claims adjudicated in a court of law, (Rev. Codes, sec. 5056).—Best Mfg. Co. v. Hutton, 78.

Warranties—Retention of Property—Effect.

4. Parties may, by the express terms of their contract, make the retention of property without complaint, conclusive evidence that a warranty contained therein has been fulfilled to the satisfaction of the purchaser.—Best Mfg. Co. v. Hutton, 78.

Breach of Warranty—Pleading—Counterclaims.

5. A breach of warranty not waived may be pleaded by way of counterclaim to an action on the purchase price, but cannot (with certain exceptions) be relied on as a defense, after acceptance and retention with knowledge of the breach.—Best Mfg. Co. v. Hutton, 78.

Acceptance—Estoppel—Principal and Agent.

6. Where defendant did not, before acceptance by use for twenty days as stipulated in the contract had become a fact, complain to plaintiff's agent that the engine purchased by him was defective but continued to use it even after the agent's alleged assurances that the defects would be remedied, remained unfulfilled, the contention that plaintiff was estopped to claim acceptance by use had no merit, in view of the provision of the contract that no agent should have any power to vary its terms and conditions.—Best Mfg. Co. v. Hutton, 78.

Breach of Contract—Time of Essence—Evidence—Inadmissibility.

7. Where a contract for the sale of sheep was silent as to time being of the essence of the contract, it was error, under section 5047, Revised Codes, which provides that time is never considered as of the essence of a contract unless by its terms expressly so provided, to permit oral evidence that such was nevertheless the intention of the parties.—Curtis v. Parham, 140.

Rescission—Duty of Buyer and Seller.

8. Where time was not of the essence of a contract for the sale of sheep, the buyers could not, under Revised Codes, section 4936, claim violation of the contract or rescind for nondelivery on the day specified, without giving the seller an opportunity to tender performance, with compensation for delay; and the seller was obliged within a reasonable time to tender performance, coupled with an offer to compensate for delay.—Curtis v. Parham, 140.

Representations—Pleadings and Proof—Irrelevancy.

9. In an action to recover a balance due on the purchase price of a lighting machine, the answer in which alleged affirmatively, among other things, that the contract had been entered into solely upon plaintiffs' representations as to the efficiency of the machine which proved untrue, evidence touching the effect of the plant upon defendant's insurance was irrelevant to the issues, in the absence of allegation as to its effect in that respect.—Hillman v. Luzon Cafe Co., 180.

Pleadings—Insufficiency to Raise Issue.

10. The averment in defendant's answer that plaintiffs had represented that the lighting machine "could be run at a given expense for a given length of time" was insufficient to raise an issue so as to admit evidence of a representation that the plant was capable of furnishing light for defendant's establishment at an operating cost of not to exceed a certain sum per month, whereas the actual cost was double that amount.—Hillman v. Luzon Cafe Co., 180.

Representations—Evidence—Admissibility.

11. The gravamen of defendant's answer having been that the written contract had been procured by false representations to induce the purchase of the lighting plant, parol evidence of such representations was admissible.—Hillman v. Luzon Cafe Co., 180.

Same.

12. Under a provision of the contract referred to above, guaranteeing that the machine could perform its work "up to claims," and in the absence of any claims in that respect in the writing, parol evidence of representations by the seller were admissible under a proper pleading.—Hillman v. Luzon Cafe Co., 180.

Acceptance—Effect.

13. Acceptance of a machine with knowledge on the part of the buyer of a particular defect prevents such defect from being available as a defense to an action for the purchase price, though it

remains pleadable as a basis for a counterclaim.—Hillman v. Luzon Cafe Co., 180.

Counterclaim—Insufficiency.

14. Counterclaim for the return of the purchase money paid for a machine, *held* obnoxious to the rule that the matter alleged must tend to diminish or defeat plaintiff's recovery, and must constitute a cause of action complete within itself.—Hillman v. Luzon Cafe Co., 180.

Retention and Use—Erroneous Instruction.

15. An instruction that retention of the machine and use for any period of time, however short, and whether reasonable or not, constitutes an acceptance, was an erroneous statement of the law, and properly refused.—Hillman v. Luzon Cafe Co., 180.

Rescission—Instruction—Improper Refusal.

16. Where the defense relied on in an action to recover on a written contract of purchase of a lighting plant was in effect a rescission, an offered instruction that a party seeking such relief must act promptly upon the discovery of facts entitling him to rescind was improperly refused.—Hillman v. Luzon Cafe Co., 180.

Bulk Sales Law—Constitutionality.

17. The bulk sales law (Rev. Codes, secs. 6131–6135), prohibiting sales of merchandise in bulk without the seller delivering to the buyer a sworn statement of the names and addresses of all the seller's creditors and declaring that, if the buyer does not apply the purchase price to the payment *pro rata* of the *bona fide* claims of creditors, the sale shall be fraudulent and void, *held* a proper exercise of the state's police power, and not unconstitutional, as violative of the equal protection or due process clauses of the Fourteenth Amendment to the Constitution of the United States.—Wheeler & Motter Mer. Co. v. Moon, 307.

Same—Creditors' Suit—Garnishment.

18. *Held,* under sections 6662 and 6821, Revised Codes, the latter of which provides that all property of a corporation, both real and personal and whether capable of manual delivery or not, may be attached on execution, in like manner as upon writs of attachment, that where plaintiff, after recovery of judgment against a mercantile corporation which had theretofore transferred its entire stock of merchandise in bulk to defendant without complying with the provisions of the bulk sales law, had served a copy of a writ of execution on defendant, together with a notice that any property in his possession or under his control belonging to the judgment debtor, was attached pursuant to the writ, a specific lien was created and fastened upon the property in favor of plaintiff sufficient to enable it to prosecute a creditors' bill against the purchaser.—Wheeler & Motter Mer. Co. v. Moon, 307.

Same—Violation—Buyer a Trustee for Creditor.

19. The failure of a buyer of a stock of merchandise in bulk to comply with the provisions of the bulk sales law converts him into a trustee of the property bought, to the extent of the creditor's claim against the seller, and in case the purchased goods have been mingled with those of the buyer so as to destroy their identity, or converted into cash, equity will hold him for their value.—Wheeler & Motter Mer. Co. v. Moon, 307.

Animals—Breach of Warranty—Remedies.

20. The purchaser of a stallion under a bill of sale warranting that the animal could be returned and exchanged for another in case the first failed to meet the warranty, was not restricted to the remedy provided in the bill but could, upon refusal of the seller to take

back the animal, or failure to offer a substitute acceptable to the buyer, maintain his action to recover the purchase price.—Sutherland v. Green, 379.

Same—Resale—Breach of Warranty—Waiver of Cause of Action.

21. In the absence of an express waiver, the resale of the animal referred to above did not waive the cause of action which arose in favor of the first buyer out of a breach of the warranty under which it was bought.—Sutherland v. Green, 379.

Same—Documentary Evidence—Admissibility.

22. A tally sheet required to be kept by the buyer of the stallion and returned to the seller in the event of dissatisfaction on the part of the former, *held* admissible in an action to recover the purchase price, it having been a record made in a regular course of business for the benefit of defendant.—Sutherland v. Green, 379.

SHERIFFS.

Power to fill vacancy in office of sheriff,—see Office and Officers, 1–4.

Sale of personal property by, under provision in chattel mortgage, not judicial sale,—see Fraudulent Conveyances, 3.

Removal—Neglect of Duty—Accusation—Sufficiency.

1. An accusation looking to the removal of a sheriff from office because of neglect of official duty—an offense public in its nature under section 8107, Rev. Codes—which was entitled in the name of the state "on the accusation" of certain persons, was sufficient in form, where from the whole body of the document it was apparent that a public proceeding and not a private action was initiated by it.—State v. Driscoll, Sheriff, 558.

Same—Accusation—Contents.

2. An accusation of the character of the above need not allege that the accuser is an elector of the county in which accused holds office. State v. Driscoll, Sheriff, 558.

Same.

3. To charge the existence of a riot for failure to suppress which defendant sheriff was sought to be removed from office, it was not necessary to employ the language of section 8565, Revised Codes, defining a riot; a statement of facts from which its existence was inferable being sufficient.—State v. Driscoll, Sheriff, 558.

Same—Accusation—Sufficiency.

4. The accusation above referred to was not rendered objectionable because specific crimes therein mentioned as having been committed during the riot were not described with the particularity required in an indictment or information against the perpetrators thereof, their commission having been incidental only and in nowise affecting the duty of the sheriff in the premises.—State v. Driscoll, Sheriff, 558.

Same—Accusation—Justification—Matter of Defense.

5. Circumstances tending to justify or excuse the conduct of accused for which he was sought to be removed from office were matters of defense which it was not necessary to anticipate in the accusation.—State v. Driscoll, Sheriff, 558.

Same—Accusation—Verbal Misprision—Immateriality.

6. Where it was fairly deducible from a paragraph of an accusation charging official delinquency on the part of a sheriff that it was intended to allege that the accused had failed to serve bench warrants issued out of the district court in the regular way upon the order of the judge, a verbal misprision to the effect that they were issued by the judge instead of by the clerk, may not be held to have rendered

that portion of the accusation valueless.—State v. Driscoll, Sheriff, 558.

SPECIAL ADMINISTRATORS.

See Probate Proceedings, 3.

SPECIAL ELECTIONS.

See Elections, 1–2, 8.

SPECIAL IMPROVEMENT DISTRICTS.

See Cities and Towns, 2–9.

STALLIONS.

See Sales, 20–22.

STATE HORTICULTURALIST.

Powers.

1. The state horticulturalist being a creature of statute, the extent of his authority is measured by the statute.—Welch v. Dean, 263.

Certificate of Inspection—Imperative Duty to Furnish.

2. Section 1924, Revised Codes, as amended by Chapter 121, Laws of 1911, imposes upon the state horticulturalist the imperative duty to attach his certificate of inspection to each lot or bill or nursery stock, if found free from disease or pests, leaving him no discretion to refuse to do so where the shipper omits to take out a license and provide a bond as required by amended sections 1935 and 1936.—Welch v. Dean, 263.

Statutes—Conditions Impossible of Performance—Effect.

3. *Held*, that the district court erred in denying mandatory relief to a shipper of nursery stock from another state, commanding the state horticulturalist to attach his certificate of inspection to a shipment inspected by him and found free from disease, since the requirement of section 1935, Revised Codes, for the payment of a license fee as a condition precedent to doing business in this state, was impossible of performance, the statute not making any provision for procuring the license.—Welch v. Dean, 263.

STATES.

Interstate Commerce—Congressional Regulation Exclusive, When.

1. Under section 8, Article I, of the United States Constitution, granting to Congress the power to regulate interstate commerce, to the extent that the subjects of the commercial power are in their nature national or admit of only one uniform system or plan of regulation, congressional legislation alone is demanded, and nonaction by Congress is tantamount to a declaration that they shall remain free from interference by state legislation.—Welch v. Dean, 263.

Same—Police Power.

2. Under the police power reserved to themselves by the states, they may rightfully enforce any reasonable regulation against one engaged in interstate commerce when he transacts his business in this state even though such regulation interferes indirectly with such commerce. Welch v. Dean, 263.

Same—Police Regulations—Limit of Power.

3. Under the guise of enforcing police regulations, the state may not exact impossible conditions to the right to engage in interstate commerce, or impose burdens which amount directly to a regulation of it.—Welch v. Dean, 263.

Public Policy—How Determined.

4. What constitutes the public policy of a state and what is contrary to it are questions to be determined by reference to its legislative enactments, and, in their absence, to the decisions of its courts.—Parchen v. Chessman, 326.

STATUTES.

(List of Statutes of Montana Cited or Commented upon.)

COMPILED STATUTES OF 1887.

First Division, Section 186, subdvision 3 314
Fifth Division, Section 454 23
Fifth Division Section 482 23

LAWS OF 1897.

Page 198 (Liquor Licenses) 255

LAWS OF 1899.

Page 139 (Attachment) 315

LAWS OF 1901.

Page 143 (Liquor Licenses) 255

LAWS OF 1905.

Chapter 61 (Initiative and Referendum) 405
Chapter 71 (Liquor Licenses) 255
Chapter 82 (Liquor Licenses) 255

LAWS OF 1907.

Chapter 75 (Special Improvement Districts) 275
Chapter 145 (Bulk Sales Law) ..... 309 *et seq.*

REVISED CODES OF 1907.

Section 12 411
Section 110 390
Section 165 ..... 30 *et seq.*
Section 355 590
Section 450 ..... 588 *et seq.*
Sections 450–454 ..... 591 *et seq.*
Section 491 28
Section 499 237
Section 545 ..... 437 *et seq.*
Section 1337 523
Section 1338 352
Section 1339 201
Sections 1390 *et seq.* 352
Section 1398 353
Section 1588 194
Sections 1917–1947 266
Section 2499 33
Section 2502 33
Section 2600 33
Sections 2759–2761 ..... 256 *et seq.*
Sections 2894, subd. 8 523
Sections 2933 *et seq.* 592
Section 2947 194
Section 2966 585
Section 3010 565
Section 3259, subds. 6, 80 274
Sections 3304–3317 58

Section 3386..... 38
Section 3466..... 152
Section 3552..... 410
Section 3558..... 28
Section 3602..... 126
Section 3604, subds. 3, 4..... 127
Section 3621..... 153
Section 3657..... .....148 *et seq.*
Section 3705..... 6
Section 3786..... 223
Section 3787..... 223
Section 3788..... 223
Section 3816..... 23
Section 3836..... 547
Section 3883..... 547
Section 4299..... 32
Section 4325..... 131
Section 4400..... 202
Section 4413..... 30
Section 4414..... 30
Section 4425..... 523
Section 4427..... 523
Section 4502..... ....499, 504
Section 4503..... 504
Section 4521..... 504
Section 4537..... 109
Section 4572..... 523
Section 4594..... 110
Section 4597..... 557
Section 4621..... 555
Section 4745..... 98
Section 4746..... 98
Section 4747..... 98
Section 4755..... ....98 *et seq.*
Section 4757..... 99
Section 4759..... 98
Section 4760..... 98
Section 4764..... 98
Section 4786..... 99
Section 4897..... 488
Section 4983..... 338
Section 4936..... 145
Section 5017..... .....503, 539 *et seq.*
Sections 5018, 5019..... 383
Section 5037..... 383
Section 5047..... 144
Section 5054..... 93
Section 5056..... 93
Section 5065..... 188
Section 5075..... 46
Section 5076..... 46
Sections 5309–5312..... 532
Section 5311..... ....532, 534
Section 5353..... 532
Section 5375..... ....223, 228, 262
Section 5380..... ....228, 262
Section 5437..... 262
Section 5449..... 544
Section 5466..... 487
Sections 5504, 5505..... .....486, 489

Section 5727..... ....554 *et seq.*
Section 5750..... 74
Section 5752..... 555
Section 5753..... 555
Section 5769..... 605
Section 5771..... 607
Section 6038..... 131
Section 6040..... 324
Section 6041..... 324
Section 6047..... 132
Section 6068 ....133, 324
Section 6071..... 324
Section 6115..... 44
Section 6116..... 44
Section 6128.....604 *et seq.*
Sections 6131–6135.....309 *et seq.*
Section 6178..... 72
Section 6179..... 72
Section 6181..... 335
Section 6195..... 576
Section 6200..... 340
Section 6217..... 410
Section 6220..... 411
Section 6222..... 292
Section 6223..... 292
Section 6253..... 72
Section 6278..... 162
Section 6282..... 483
Section 6293..... 161
Section 6296..... 410
Section 6337..... 357
Section 6367..... 161
Section 6342..... 357
Section 6345..... 357
Sections 6348–6350..... 357
Section 6445..... 332
Section 6451..... 575
Section 6472..... .....334 *et seq.*
Section 6475..... 334
Section 6506..... 251
Section 6534..... 215
Section 6535..... 317
Section 6539..... 216
Section 6541..... ....188, 293
Section 6579..... 211
Section 6585..... 112
Section 6588..... 211
Section 6589..... ....211, 213
Section 6593..... 426
Section 6662..... ....315, 316
Section 6698, subd. 5..... 571
Section 6710..... 581
Section 6713..... 44
Section 6714, subd. 6.....343 *et seq.*
Section 6719..... 599
Section 6723..... ....597, 599
Section 6729..... ....213, 215
Section 6760..... 323
Section 6762..... 599
Section 6788..... 88

Section 6793..... 597
Section 6796..... 86
Section 6800..... 324
Section 6803..... 323
Section 6821..... 316
Section 6870..... 140
Sections 7056–7060.....481 *et seq.*
Section 7069..... 480
Section 7098.....254, 480, 483, 581
Section 7103..... 320
Section 7121..... 192
Section 7122..... 193
Section 7124..... 193
Section 7128..... 193
Section 7139..... 581
Section 7141..... 97
Section 7196..... 56
Section 7214.....522, 596
Section 7234..... 245
Section 7239..... 245
Sections 7269–7288..... 499
Section 7271..... 498
Section 7276..... 499
Section 7283..... 505
Section 7290..... 515
Section 7293..... 515
Section 7398..... 97
Section 7432..... 148
Section 7436..... 148
Section 7472..... 148
Section 7711..... 97
Section 7712..... 598
Section 7714..... 97
Section 7715..... 97
Section 7771..... 223
Section 7774..... 225
Section 7775..... 225
Section 7777..... 225
Section 7783..... 223
Section 7795..... 223
Section 7864..... 427
Section 7873.....383, 384
Section 7877.....384, 544
Section 7924..... 246
Section 7960..... 128
Section 7961..... 557
Section 7962.....128, 557
Section 7962, subd. 16..... 358
Section 7962, subds. 11, 12, 33..... 607
Section 8028..... 426
Section 8107..... 560
Section 8112..... 427
Section 8291..... 175
Section 8309..... 368
Section 8358..... 153
Section 8416..... 161
Section 8565..... 565
Section 8894..... 368
Section 8962..... 565
Section 8963..... 565

Section 8967..... 461
Section 9006..... ....560, 561
Section 9247..... ....357, 358
Section 9249..... 357
Section 9251.... 357
Section 9282..... 175

LAWS OF 1909.

Chapter 1 (Adoption of Codes).....256, 316
Chapter 114 (Disqualification of Judges).....249 *et seq.*

LAWS OF 1911.

Chapter 4 (Justices' Courts—Appeals) 192
Chapter 9 (Juries) 357
Chapter 57 (Commission Form of Government) 280
Chapter 92 (Liquor Licenses) .....192 *et seq.*, 257 *et seq.*,
Chapter 112 (New Counties) 156
Chapter 113 (Elections) .....27 *et seq.*, 237 *et seq.*
Chapter 121 (Horticulture) 266

LAWS OF 1913.

Chapter 5, section 1 (County Offices) .....586 *et seq.*
Chapter 35 (Liquor Licenses) .....257, 578 *et seq.*
Chapter 66, section 1 (Elections) 390
Chapter 72, section 3 (Highway Law) 157, 523
Chapter 74 (Elections) ....26 *et seq.*
Chapter 79 (State Athletic Commission) 390
Chapter 89 (Special Improvement Districts) .....275 *et seq.*
Page 570 (Primary Election Law) .....437 *et seq.*

STATUTES AND STATUTORY CONSTRUCTION.

See, also, Elections, 1, 2.

Statutory Construction.

1. In construing a state statute, courts must adopt that construction which, without doing violence to the fair meaning of the words used, brings the Act into harmony with the provisions of the federal Constitution and laws.—State ex rel. General Electric Co. v. Alderson, 29.

Foreign Corporations—Articles of Incorporation—Filing Fee—Validity of Statute.

2. Section 165, Revised Codes, though inoperative so far as it authorizes the secretary of state to exact prescribed fees for recording and filing certificates of incorporation of foreign corporations engaged in *interstate* commerce, is valid as to such corporations seeking to engage in strictly private, *intrastate* business.—State ex rel. General Electric Co. v. Alderson, 29.

Statutes—Revision of—Title.

3. A bill the purpose of which is to revise by amendment the law on a particular subject, *held* to fall within the exception of section 23, Article V, of the state Constitution that no bill "except bills for the * * * general revision of the laws" shall be passed containing more than one subject, which shall be clearly expressed in its title, State ex rel. Cotter v. District Court, 146.

Divorce—Remarriage—Statutes.

4. Under the above rule, section 3657, Revised Codes (section 91, Civil Code of 1895, as reported by the Code Commissioner), regulating remarriage of divorced persons, *held* to have been repealed by House Bill 142, approved March 6, 1895, an Act to amend certain

sections of the Civil Code dealing with the subject of divorce, though the title of the repealing Act did not contain any reference to section 91.—State ex rel. Cotter v. District Court, 146.

Same—Constitutionality—Considerations Entering into Determination.

5. Where attorneys general for nineteen years had advised county officers that section 3657, Revised Codes, prohibiting the remarriage of divorced persons for a certain number of years, had been repealed, the supreme court would, in case of doubt on the question whether the repealing Act had been constitutionally enacted, be inclined to uphold it in view of the disastrous consequences which would follow a contrary holding.—State ex rel. Cotter v. District Court, 146.

Statutory Construction—Surplusage.

6. When words or expressions are found in a statute to which no meaning can be assigned consistent with the legislative intent as collected from the entire Act, they must be treated as surplusage and disregarded.—Shapard v. City of Missoula, 269.

Policy of Law—Matter for Legislature.

7. The policy of the law is a matter of legislative control and does not concern the courts.—Wheeler & Motter Mer. Co. v. Moon, 307.

Statutes—Constitutionality—Duty of Courts.

8. No Act of the legislature should be declared invalid unless the conflict between its provisions and the Constitution is plainly apparent.—Wheeler & Motter Mer. Co. v. Moon, 307.

Mandatory Statutes—Discretion.

9. The fact that a statute is mandatory in requiring the district court to do a thing, under certain conditions, in the disposition of a cause, does not deprive it of discretion in determining whether a given case falls within the statute.—Rule v. Butori, 342.

Repeal by Implication.

10. Repeal of a statute by implication is not favored by the courts.—State ex rel. Metcalf v. Wileman, 436.

Same—Rule.

11. To make the claim tenable that an earlier statute was repealed by a later one, the two Acts must be plainly and irreconcilably repugnant to, or in conflict with, each other, must relate to the same subject, and have the same object in view.—State ex rel. Metcalf v. Wileman, 436.

STATUTES OF LIMITATIONS.

Defense may be Waived.

1. The defense of the statute of limitations may be waived by the party for whose benefit it is provided, either before or after the prescribed limit, and if it is not invoked at the proper time and in the manner prescribed, it cannot avail him even though it appears incidentally that the cause of action alleged against him is completely barred.—Parchen v. Chessman, 326.

Promissory Notes—Waiver—Public Policy.

2. *Held*, that a stipulation embodied in a promissory note, to the effect that the maker expressly waives all rights and benefits conferred by the statute of limitations, is not void as against public policy, and that by it he binds himself not to plead the statute—if not for all time—for at least a reasonable time, *i. e.*, until the expiration of an additional period of eight years after the period prescribed by section 6445, Revised Codes.—Parchen v. Chessman, 326.

Same—Stipulation Waiving Statute of Limitations—Consideration.

3. *Held*, that the pre-existing indebtedness evidenced by the note which the writing was intended to renew was a sufficient consideration

for the entire contract of renewal; and that therefore the contention that the stipulation therein, whereby the maker waived the benefit of the statute of limitations, was without consideration, had no merit.—Parchen v. Chessman, 326.

Real Property—Laches.

4. *Held* that plaintiff's action to recover land claimed by him to have been rightfully entered by him under the public land laws of the United States, but wrongfully patented to the Northern Pacific Railway Company under its land grant, was barred by the provision of section 6451, Revised Codes, because not commenced until fifteen years after patent to the railway company.—Kimes v. Northern Pacific Ry. Co., 573.

Same—Verbal Assertion of Title—Insufficiency.

5. Mere verbal assertion of title to real estate does not prevent the running of the statute of limitations.—Kimes v. Northern Pacific Ry. Co., 573.

Same—Laches—Estoppel.

6. Where a claimant of land permitted thirty years to elapse before he seriously attempted to enforce his claim, and during that time the value of the land had increased more than a hundred-fold, and innocent third parties without notice of his claim had purchased portions thereof and expended time and money in their improvement, he was estopped by laches.—Kimes v. Northern Pacific Ry. Co., 573.

STIPULATIONS.

Affecting rights of party not party thereto,—see Liquor Licenses, 5.

See, also, Pleading and Practice, 21.

STREET RAILWAYS.

Duty toward travelers on streets,—see Personal Injuries, 17.

STREETS AND HIGHWAYS.

Travelers on—Duty of street railways,—see Personal Injuries, 17, 18.

Bridge is portion of highway,—see Counties, 1.

Highways—Obstructions—Duty of Counties.

1. A county is not required to keep its highways in condition fit for travel for their entire statutory width of sixty feet, its duty being discharged if portions thereof, sufficiently wide to accommodate the travel fairly to be anticipated, are kept in proper condition; the remaining portions may properly be used for purposes inconsistent with their use as driveways, *i. e.*, for piling rocks, constructing drainage ditches, *etc.*—Howard v. Flathead Independent Tel. Co., 197.

Same—Width—Sufficiency—Jury Question.

2. Whether the portion of a highway graded or otherwise made suitable for travel is of sufficient width to accommodate the public is a question of fact.—Howard v. Flathead Independent Tel. Co., 197.

Telephone Poles—Construction on Highways.

3. A telephone company is not a trespasser on a highway nor negligent *per se* in maintaining a guy wire on a portion of it not intended for travel, section 4400, Revised Codes, giving to such company the right to construct its lines along the highways, provided the traveling public is not endangered or inconvenienced thereby.—Howard v. Flathead Independent Tel. Co., 197.

Highways—How Discontinued.

4. Where a public road had been established at public expense in strict conformity with statutory provisions and with plaintiff's consent

relinquishing compensation so far as said road ran through his land, it had, under section 1338, Revised Codes, to remain such until abandoned as therein provided, and the failure of the county commissioners to comply with conditions attached to plaintiff's consent, did not clothe him with the right to maintain ejectment against the county. Flynn v. Beaverhead County, 347.

Bridge—Part of Highway.

5. A bridge is part and parcel of a public highway.—State ex rel. Donlan v. Board, 517.

SUNDAY.

Validity of acts done on,—see Constitution, 11.

SURPLUSAGE.

See Pleading, 28; Statutes and Statutory Construction, 6.

TECHNICALITIES.

See Appeal and Error, 8, 19.

TELEGRAPHS AND TELEPHONES.

Telephone Poles—Construction on Highways.

1. A telephone company is not a trespasser on a highway nor negligent *per se* in maintaining a guy wire on a portion of it not intended for travel, section 4400, Revised Codes, giving to such company the right to construct its lines along the highways, provided the traveling public is not endangered or inconvenienced thereby.—Howard v. Flathead Ind. Tel. Co., 197.

TITLE.

See Quieting Title; Real Property.

TRIAL.

See, also, Amendments; Bills of Exceptions; Burden of Proof; Cross-examination; Discretion; District Courts; Evidence; Findings; Instructions; Jury; New Trial; Objections; Pleading and Practice; Reopening Case; Variance; Verdicts.

Jury—Question of Law—Erroneous Submission—Harmless Error.

1. The submission of the question whether the place where plaintiff was injured was within his working place, if error, was harmless where the court, under the evidence, might properly have instructed them that it was not,—a conclusion arrived at by their general verdict in his favor.—McInness v. Republic Coal Co., 112.

Trial by Particular Judge—Rights of Parties.

2. No party litigant has any vested right to have his cause heard before a particular judge.—State ex rel. Little v. District Court, 158.

TRUSTS AND TRUSTEES.

See, also, Corporations, 1–9; Sales, 19.

Reconveyance of Trust Property—Complaint—Sufficiency.

1. Complaint in a suit to compel a reconveyance of trust property on the ground that the purposes of the trust had been fully accomplished, *held* to allege facts from which it was fairly inferable that the trustee had been fully reimbursed for all advancements made by him, and hence was sufficient as against a general objection to the introduction of evidence.—Willoburn Ranch Co. v. Yegen, 101.

Defenses—Estoppel.

2. Where, in an action to compel a reconveyance of certain trust property on the ground that the purposes of the trust had been fully accomplished, defendant in his answer recognized the original contract by which the trust was created and the property conveyed as valid, but set up title to the property by virtue of a subsequent contract, he could not thereafter contend that the original contract was void because not in writing.—Willoburn Ranch Co. v. Yegen, 101.

UNDERTAKINGS.

On Appeal—Municipal Officers.

1. On appeal from an adverse judgment in an action against the mayor of a city in his official capacity, he is not, under section 7196, Revised Codes, required to furnish an undertaking.—State ex rel. Dwyer v. Duncan, Mayor, 54.

On Appeal to District Court—Liquor Licenses—Undertaking not Required.

2. Chapter 92, Laws of 1911, provides that the protestants against the issuance of a liquor license in a place not within the corporate limits of a city or town, or the applicant therefor, may appeal to the district court, "the appeal to be taken and heard in the same manner as appeals from justice courts." *Held*, that the filing of an undertaking is not necessary to confer jurisdiction upon the district court to entertain such an appeal.—Thien v. Wiltse, 189.

UNLAWFUL DETAINER.

See Landlord and Tenant.

VACANCIES.

In county offices—Power to fill,—see Office and Officers, 1–4.

VARIANCE.

Immaterial—Appeal.

1. Immaterial variances not affecting the substantial rights of the parties will be disregarded on appeal.—Willoburn Ranch Co. v. Yegen, 101.

VENDOR AND PURCHASER.

Real Property—Misrepresentations—Reliance upon.

1. An instruction which in effect told the jury that if defendant did not rely upon alleged misrepresentations made by plaintiff with respect to the character and quantity of land bought from him by the former but acted upon his own investigation, he could not recover upon his counterclaim based upon such misrepresentations, *held* not open to criticism.—Lukert v. Eldridge, 46.

Same—Opinions—Misrepresentations—Reliance upon.

2. Under an instruction that when a seller states his opinion as to the quality or quantity of land he is endeavoring to sell, and such statement is made merely as his opinion and not as a statement of fact which he knows to be true, the buyer cannot rely thereon but must exercise his own judgment, and in view of defendant's testimony that he knew plaintiff was only giving him his opinion on the subject, a verdict in favor of plaintiff was proper.—Lukert v. Eldridge, 46.

VERDICTS.

Conclusiveness,—see Appeal and Error, 4.

Work and Labor—Evidence—Sufficiency.

1. In an action for wages due in which defendant, relying upon his motion for nonsuit, declined to introduce any testimony, plaintiff's

evidence that there was due him between $400 and $500, *held* sufficiently specific to warrant a verdict for an amount not to exceed $400.—Loeffler v. Dunning, 177.

Personal Injuries—What is not Excessive Verdict.

2. *Held*, that a verdict in the sum of $15,000 in favor of a trainman, thirty years of age at the time of the accident and earning $2,100 per annum, for the loss of his left arm below the elbow, was not so large as to force the conclusion that in making the award the jury were influenced by passion and prejudice, rendering a new trial necessary.—White v. Chicago M. & P. S. Ry. Co., 419.

WAIVER.

Of defects in machinery,—see Sales, 1–3.

Of defense of statute of limitations,—see Statutes of Limitations, 1, 2.

Briefs—Assignments of Error.

1. Specifications of error not argued in appellant's brief will be deemed waived or abandoned.—Trogdon v. Hanson Sheep Co., 1.

Same—Notice of Intention.

2. If there was untimeliness in filing notice of intention, it was waived by the conduct of opposing counsel in extending appellant's time to file his bill of exceptions, and entering into a stipulation whereby his time to propose amendments was enlarged.—Best Mfg. Co. v. Hutton, 78.

Livestock—Breach of Warranty—Waiver of Cause of Action.

3. In the absence of an express waiver, the resale of an animal did not waive the cause of action which arose in favor of the first buyer out of a breach of the warranty under which it was bought.—Sutherland v. Green, 379.

WARRANTY.

See Sales, 4, 5, 20.

WITNESSES.

See, also, Evidence.

Preponderance of evidence—How to be determined,—see Jury, 1.

WILLS.

Pretermission of children from—Admissibility of evidence showing intention of testator,—see Evidence, 7.

WORDS AND PHRASES.

"Actionable *per se*"—
Cooper v. Romney, 124, 125.

"As prescribed in this Chapter"—(Rev. Codes, sec. 2759.)
State ex rel. Frost v. Barnett, 257, 258.

"Bridges"—(Laws 1911, Chap. 112.)
State ex rel. Foster v. Ritch, 156.

"Constitution"—
State ex rel. Hay v. Alderson, 404.

"Directory"—
State ex rel. Hay v. Alderson, 416, 417.

"Discretion"—
Gibson, Admx., v. Morris State Bank, 71.

"Graft"—
Cooper v. Romney, 125, 126.

"Issue of Fact"—
State ex rel. Culbertson Ferry Co. v. District Court, 597, 601.

"Judicial Sale"—
Kerr v. Blaine, 605.

"Larceny"—
Valley Mer. Co. v. St. Paul etc. Ins. Co., 434.

"Malice"—
State v. Halk, 174.

"Mandatory"—
State ex rel. Hay v. Alderson, 416, 417.

"Martial Law"—
In re McDonald, 468 *et seq.*

"May"—(Rev. Codes, sec. 6714, subd. 6.)
Rule v. Butori, 344.

"Mistake"—
Parchen v. Chessman, 339.

"Neglect"—(Rev. Codes, sec. 6714, subd. 6.)
Rule v. Butori, 345.

"New Trial"—
State ex rel. Culbertson Ferry Co. v. District Court, 597, 600.

"Partnership"—
Croft v. Bain, 487.

"Subject of Action"—(Rev. Codes, sec. 6541.)
Pittsmont Copper Co. v. O'Rourke, 293.

"Taken and Heard"—Appeals—(Laws 1911, Chap. 92.)
Thien v. Wiltse, 194.

"Until"—
State ex rel. Rowe v. Kehoe, 588.

"Until the next general election"—(Const., Art. XVI, sec. 5.)
State ex rel. Rowe v. Kehoe, 586 *et seq.*

"Working place"—(Laws 1911, Chap. 120.)
McInness v. Republic Coal Co., 115 *et seq.*

WORK AND LABOR.

***Quantum Meruit*—Corporations—Evidence—Admissibility.**

1. Where labor has been performed for a corporation with the knowledge of its directors and officers and without objection on their part, it is liable on a *quantum meruit*, in the absence of an express contract under which it was performed; and evidence which brings home to such officers knowledge of the fact that plaintiff expected pay is admissible.—Trogdon v. Hanson Sheep Co., 1.

Evidence—Sufficiency.

2. In an action for wages due in which defendant, relying upon his motion for nonsuit, declined to introduce any testimony, plaintiff's evidence that there was due him between $400 and $500, *held*, sufficiently specific to warrant a verdict for an amount not to exceed $400.—Loeffler v. Dunning, 177.

WRITS.

See Attachment; Certiorari; Habeas Corpus; Injunction; Mandamus; Prohibition; Supervisory Control.

TABLE OF MONTANA CASES CITED—VOL. 49.

Alderson v. Marshall, 7 Mont. 288..... 453
(Trial—Reopening Case—Discretion.)
Allen v. Bear Creek Coal Co., 43 Mont. 269..... 7
(Instructions—Assumption of Fact—Error.)
(Master and Servant—Independent Contractor)..... 118
American Min. Co. v. Basin & Bay State Min. Co., 39 Mont. 476.... 335
(Statute of Limitations—Waiver.)
(Reformation of Instruments)..... 338
Anaconda Copper Min. Co. v. Thomas, 48 Mont. 222.....188, 291, 293
(Equity—Pleadings—Sufficiency.)
Arnold v. Fraser, 43 Mont. 540..... 44
(Cancellation of Void Instruments.)
(Equity—Complaint)..... 45
Armington v. Stelle, 27 Mont. 13..... 544
(Evidence—Letters.)

Babcock v. Maxwell, 21 Mont. 507..... 188
(Pleading—Counterclaim.)
Badovinac v. Northern Pac. Ry. Co., 39 Mont. 454..... 203
(Personal Injuries—Complaint.)
Ball v. Gussenhoven, 29 Mont. 321..... 203
(Personal Injuries—Complaint.)
Barnes v. Smith, 48 Mont. 309..... 571
(Corporations.)
Bean v. Missoula Lumber Co., 40 Mont. 31..... 251
(Disqualification of Judges.)
Benepe-Owenhouse Co. v. Scheidegger, 32 Mont. 424..... 171
(Affidavits on Information and Belief.)
Berlin Machine Co. v. Midland etc. Co., 45 Mont. 390..... 91
(Breach of Contract of Sale.)
Berryman v. Billings etc. Co., 44 Mont. 517.....571, 572
(Receivers.)
Best Mfg. Co. v. Hutton, 49 Mont. 78..... 187
(Sales—Acceptance—Defense—Counterclaim.)
Birsch v. Citizens' El. Co., 36 Mont. 574..... 203
(Personal Injuries—Complaint.)
Blankenship v. Decker, 34 Mont. 292..... 6
(Corporations.)
Boehme v. Fitzgerald, 43 Mont. 226..... 488
(Partners—Actions Between.)
Bordeaux v. Bordeaux, 32 Mont. 159.....72, 512
(Equity—Findings—Conclusiveness.)
(Evidence—Probative Value)..... 70
(Implied Findings)..... 487
Boyd v. Huffine, 44 Mont. 306..... 512
(Equity Cases—Findings—Conclusiveness.)
Brown v. Erb-Harper-Rigney Co., 48 Mont. 17..... 571
(Receivers.)
Brown v. Independent Pub. Co., 48 Mont. 374..... 125
(Libel—Language Actionable *Per Se.*)
Burch v. Roberson, 47 Mont. 456.. 192
(Justices' Courts—Appeals.)

Burke v. Interstate etc. Assn., 25 Mont. 315..... 411
(Sunday—Service of Summons.)
Butte & Boston etc. Co. v. Mont. O. P. Co., 27 Mont. 152..... 581
(Nonappealable Orders.)

Canning v. Fried, 48 Mont. 560..... 197
(Bills of Exception—Settlement.)
(New Trials) 599
Carlson v. City of Helena, 39 Mont. 82..... 279
(Municipal Corporations—Powers.)
(Statute—Title—Unity of Subject)..... 405
Chauvin v. Valiton, 8 Mont. 451.....323, 325
(Claim and Delivery—Damages.)
Chestnut v. Sales, 44 Mont. 534..... 320
(Cited.)
Chicago, M. & St. P. Ry. Co. v. Swindlehurst, 47 Mont. 119.....31, 37
(Corporations—Liscense Fees.) DISTINGUISHED.
Christiansen v. Aldrich, 30 Mont. 446..... 45
(Statute of Frauds.)
City of Butte v. Goodwin, 47 Mont. 155..... 224
(Trustees.)
Coleman v. Kerr, 33 Mont. 198..... 245
(Election Contests.)
Collier v. Ervin, 3 Mont. 142..... 293
(Counterclaim.)
Collins v. Metropolitan L. Ins. Co., 32 Mont. 329..... 95
(Principal and Agent.)
Conway v. Monidah Trust, 47 Mont. 269..... 203
(Personal Injuries—Complaint.)
Copper Mt. Min. Co. v. Butte etc. Co., 39 Mont. 487..... 72
(Equity—Conclusiveness of Findings.)
Cotter v. Grand Lodge, 23 Mont. 82..... 93
(Contracts.)
Cullen v. Western etc. Title Co., 47 Mont. 513..... 335
(Statute of Limitations—Waiver.)
Custer County v. Yellowstone County, 6 Mont. 39..... 417
(Constitution—Mandatory Provisions.)

Daily v. Marshall, 47 Mont. 377..... 371
(Corporations.)
Davenport v. Kleinschmidt, 6 Mont. 502..... 278
(Municipal Corporations—Powers.)
Davis v. Davis, 9 Mont. 267..... 291
(Equity—Pleadings.)
Deuninck v. West Gallatin Irr. Co., 28 Mont. 255..... 93
(Contracts—Liquidated Damages.)
Donovan v. McDevitt, 36 Mont. 61..... 44
(Complaint—Sufficiency—How Determined.)
Dupont v. McAdow, 6 Mont. 226..... 358
(Challenge to Jury.)

Emerson v. Bigler, 21 Mont. 200..... 216
(Evidence—Erroneous Admission—Harmless Error.)
Evers v. Hudson, 36 Mont. 135..... 417
(Constitution—Mandatory Provisions.)

Ferris v. McNally, 45 Mont. 20..... 6
(Instructions—Assumption of Fact—Error.)
Finch v. Kent, 24 Mont. 268..... 306
(Actual Fraud and Fraud in Law.)

Finlen v. Heinze, 27 Mont. 107..... 480
(Appeal—Limitations and Regulations.)
Finlen v. Heinze, 28 Mont. 548..... 567
(Evidence—Erroneous Admission—Harmless Error.)
Finlen v. Heinze, 32 Mont. 354..... 72
(Equity—Conclusiveness of Findings.)
First Nat. Bank v. Smith, 44 Mont. 305..... 111
(Corporate Capacity—General Denial—Insufficiency.)
Fitschen v. Thomas, 9 Mont. 52..... 338
(Reformation of Instruments.)
Flaherty v. Butte El. Ry. Co., 43 Mont. 141..... 430
(Excessive Damages.)
(Street Railways—Duty of Motormen)..... 451
Ford v. City of Great Falls, 46 Mont. 292..... 38
(Statutory Construction.)
(Municipal Corporations—Special Improvement Districts).... 280
Ford v. Drake, 46 Mont. 314..... 544
(Evidence—Letters.)
Forrester v. Boston etc. Min. Co., 21 Mont. 544..... 19
(Corporations.)
Forsell v. Pittsburg & Mont. Copper Co., 42 Mont. 412..... 571
(Receivers—Insolvency.)
Franzman v. Davies, 32 Mont. 251..... 344
(Actions—Dismissal.)
Fratt v. Daniels-Jones Co., 47 Mont. 487..... 44
(Cancellation of Void Instruments.)
Frederick v. Hale, 42 Mont. 153..... 4
(Offer of Proof.)
Fredericks v. Davis, 3 Mont. 251..... 556
(Equity—Relief to be Denied, When.)
Freeman v. Weare, 42 Mont. 472..... 88
(Bills of Exception—Settlement.)
Frost v. Heslet, 19 Mont. 188..... 304
(Corporations—Creditors.)

Gans v. Switzer, 9 Mont. 408..... 571
(Corporations.)
Gassert v. Bogk, 7 Mont. 585..... 77
(Mortgages—Deeds Absolute—Burden of Proof.)
Gehlert v. Quinn, 35 Mont. 451..... 4
(Appeal—Review—Exceptions Necessary.)
Gibson, Admx., v. Morris State Bank, 49 Mont. 60..... 554
(Mortgages.)
Gilmore v. Ostronich, 48 Mont. 305..... 139
(Appeal—Record.)
Girard v. McClernan, 39 Mont. 523..... 88
(Bills of Exception—Settlement.)
Grinrod v. Anglo-American Bond Co., 34 Mont. 169..... 53
(Fraud.)
Grogan v. Valley Trading Co., 30 Mont. 229..... 335
(Statute of Limitations—Waiver.)

Haupt v. Independent T. M. Co., 25 Mont. 122..... 216
(Parties—Misjoinder—Waiver.)
Hauswirth v. Sullivan, 6 Mont. 203..... 411
(Sunday—Service of Summons.)
Hefferlin v. Karlman, 30 Mont. 348..... 51
(Cross-examination—Scope.)
Helena L. & Ry. Co. v. City of Helena, 47 Mont. 18..... 278
(Municipal Corporations—Powers.)

Hennessy v. Holmes, 46 Mont. 89..... 339
(Reformation of Instruments—Mistake.) OVERRULED IN PART.
Holter Hdwe. Co. v. Ontario M. Co., 24 Mont. 184..... 211
(Pleadings—Amendments.)
Hotchkiss v. Marion, 12 Mont. 218..... 405
(Statutes—Title—Unity of Subject.)
Hull v. Diehl, 21 Mont. 71..... 557
(Deeds—Validity—Burden of Proof.)
Hunter v. Conrad, 18 Mont. 177..... 487
(Partnership—Matter of Intention.)
Hynes v. Barnes, 30 Mont. 25..... 325
(Claim and Delivery—Damages.)

In re Antonioli's Estate, 42 Mont. 219..... 598
("Issue of Fact"—New Trial.)
In re Davis' Estate, 35 Mont. 273..... 224
(Trustees.)
In re Dougherty's Estate, 34 Mont. 336..... 98
(Probate Practice.)
In re Jones, 46 Mont. 122..... 478
(Habeas Corpus.)
In re Ricker's Estate, 14 Mont. 153..... 228
(Guardians—Profit Out of Trust Funds.) OVERRULED.
In re Ryan, 20 Mont. 64.....150, 152
(Statutory Construction.)
In re Searles, 46 Mont. 322..... 194
(Appeals are Statutory.)
In re Terrett, 34 Mont. 325..... 405
(Statutes—Title—Unity of Subject.)

Jensen v. Barbour, 12 Mont. 566..... 71
(Judicial Discretion.)

Kallio v. Northwestern Imp. Co., 47 Mont. 314.....115, 116
(Coal Mining—Working Place—Definition.)
Kavanaugh v. Flavin, 35 Mont. 133..... 576
(Equity—Laches.)
Kelley v. Fourth of July Min. Co., 16 Mont. 484..... 117
(Master and Servant—Assumption of Risk.)
Kelly v. Independent Pub. Co., 45 Mont. 127..... 127
(Libel—Malice.)
Kennedy v. Dickie, 27 Mont. 70..... 499
(Unlawful Detainer.)
Kennon v. Gilmer, 4 Mont. 435..... 202
(Negligence—Complaint.)
Kipp v. Silverman, 25 Mont. 296..... 51
(Cross-examination—Scope.)
Kleinschmidt v. Steele, 15 Mont. 181..... 293
(Equity—Relief.)
Knatz v. Wise, 16 Mont. 555..... 216
(Parties—Misjoinder—Waiver.)
Knuckey v. Butte El. Ry. Co., 45 Mont. 106..... 51
(Cross-examination—Scope.)
(Excessive Damages)..... 430

Landsman v. Thompson, 9 Mont. 182..... 69
(New Trial Order—When not Conclusive.)
Lane v. Bailey, 29 Mont. 548..... 567
(Evidence—Erroneous Admission—Harmless Error.)

Lane v. Commissioners, 6 Mont. 473..... 151
(Statutes—Title.)
Leveridge v. Hennessy, 48 Mont. 58..... 68
(New Trial.)
(Equity—Conclusiveness of Findings)..... 72
Lisker v. O'Rourke, 28 Mont. 129..... 581
(Nonappealable Orders.)
Lockey v. City of Bozeman, 42 Mont. 387..... 575
(Statute of Limitations.)
Loeb v. Kamak, 1 Mont. 152..... 599
(New Trial—Issue of Fact.)
Logan v. Billings & N. R. Co., 40 Mont. 467..... 216
(Parties—Misjoinder—Waiver.)
Longpre v. Big Blackfoot Milling Co., 38 Mont. 99..... 203
(Personal Injuries—Nonsuit.)
Lynch v. Herrig, 32 Mont. 267..... 110
(Equity—Fraud.)
Lynes v. Northern Pac. Ry. Co., 43 Mont. 317..... 203
(Personal Injuries—Complaint.)

MacGinniss v. Boston & Mont. etc. Co., 29 Mont. 428..... 334
(Public Policy.)
Mantle v. Speculator Min. Co., 27 Mont. 473.....575, 576
(Statute of Limitations—Laches.)
Marlowe v. Michigan Stove Co., 48 Mont. 342..... 193
(Defective Undertaking on Appeal.)
Mathias v. White Sul. S. Co., 19 Mont. 359..... 545
(Corporations—Powers.)
McConnell v. Combination M. & M. Co., 30 Mont. 239.....19 *et seq.*
(Corporations.)
McConnell v. Combination M. & M. Co., 31 Mont. 563.....21, 22
(Corporations.)
McDonald v. Goodkind, 22 Mont. 491..... 186
(Contracts—Fraud.)
McGillic v. Corby, 37 Mont. 249..... 279
(Municipal Corporations—Powers.)
McIntire v. MacGinniss, 41 Mont. 87.....515, 516
(Mechanics' Liens.)
Merk v. Bowery Min. Co., 31 Mont. 298..... 43
(Complaint—Sufficiency—How Determined.)
Mette & Kanne D. Co. v. Lowrey, 39 Mont. 124..... 4
(Briefs—Assignments of Error—Waiver.)
Monson v. La France C. Co., 39 Mont. 50..... 201
(Negligence—Burden of Proof.)
Montana O. P. Co. v. Boston etc. Co., 27 Mont. 288..... 161
(Rules of Court.)
Morgan v. Reynolds, 1 Mont. 163.....323, 325
(Claim and Delivery—Damages.)
Morin v. Wells, 30 Mont. 76..... 193
(Justices' Courts—Appeal.)
Moss v. Goodhart, 47 Mont. 257..... 51
(Cross-examination—Scope.)
Murphy v. Stone & Webster E. Corp., 44 Mont. 146..... 544
(Evidence—Letters.)
Murray v. City of Butte, 7 Mont. 61..... 352
(Eminent Domain.)

Nelson v. Boston & Mont. etc. Co., 35 Mont. 223..... 4
(Briefs—Assignments of Error—Waiver.)
(Personal Injuries—Nonsuit)..... 203

Newell v. Whitwell, 16 Mont. 243..... 70
(New Trial.)

O'Donnell v. City of Butte, 44 Mont. 97..... 111
(Corporate Capacity—General Denial.)
Ogle v. Potter, 24 Mont. 501..... 599
(New Trial.)
O'Malley v. O'Malley, 46 Mont. 549..... 513
(Witnesses—Credibility.)
Orr v. Haskell, 2 Mont. 225..... 69
(New Trial Order.)
(Right of Trial by Jury)..... 71

Parchen v. Anderson, 5 Mont. 438..... 488
(Partnership.)
Paxton v. Woodward, 31 Mont. 195.....125 *et seq.*
(Libel—Language Actionable *Per Se.*)
Pope v. Alexander, 36 Mont. 82..... 140
(Appeal—Record.)
Potter v. Furnish, 46 Mont. 391..... 26, 417
(Elections.)
Potter v. Lohse, 31 Mont. 91..... 293
(Counterclaim.)
Pullen v. City of Butte, 45 Mont. 46.....344, 345
(Actions—Dismissal.)
Purdum v. Laddin, 23 Mont. 387..... 417
(Statutes—Mandatory and Directory.)

Rand v. Butte El. Ry. Co., 40 Mont. 398..... 427
(Instructions—Statement of Issues.)
Randall v. American Fire Ins. Co., 10 Mont. 340..... 93
(Contracts.)
Raymond v. Blancgrass, 36 Mont. 449..... 44
(Complaint—Sufficiency—How Determined.)
(Creditors' Bill)..... 314
(Actions—Form of, Immaterial)..... 316
Reid v. Hennessy Mer. Co., 45 Mont. 383..... 72
(Equity—Conclusiveness of Findings.)
Reid v. Lincoln County, 46 Mont. 31..... 27
(Elections—Validity.)
(Bridges—Portions of Highways)..... 157
Reilly v. Hatheway, 46 Mont. 1..... 489
(Corporations—Right to Sue.)
Riddell v. Ramsey, 31 Mont. 386..... 488
(Partnership—Actions.)
Ryan v. Dunphy, 4 Mont. 356..... 45
(Statute of Frauds.)
(Evidence—Books—Admissibility)..... 219

Sathre v. Rolfe, 31 Mont. 85..... 186
(Contracts—Fraud.)
Schilling v. Curran, 30 Mont. 370..... 453
(Trial—Reopening Case—Discretion.)
Schroder v. Montana Iron Works, 38 Mont. 474..... 203
(Personal Injuries—Complaint.)
Shober v. Blackford, 46 Mont. 194..... 450
(Complaint—Insufficiency.)
Snider v. Yarbrough, 43 Mont. 203..... 144
(Contracts—Time of Essence.) DISTINGUISHED.

Spelman v. Gold Coin M. & M. Co., 26 Mont. 76..... 545
(Corporations.)
Spellman v. Rhode, 33 Mont. 21..... 499
(Unlawful Detainer.)
Stadler v. City of Helena, 46 Mont. 128.....279, 281
(Municipal Corporations—Special Improvement Districts.)
State v. Biggs, 45 Mont. 400..... 4
(Appeal—Exceptions Necessary.)
(Cross-examination—Scope)..... 51
State v. Brooks, 23 Mont. 146..... 175
(Crime—Proof Required.)
State v. Camp Sing, 18 Mont. 128..... 403
(Statutes—Unconstitutionality.)
State v. Courtney, 27 Mont. 378..... 255
(Liquor Licenses.)
State v. Groom, 49 Mont. 354..... 360
(Criminal Law—Challenging Jury.)
State v. Howard, 30 Mont. 518..... 51
(Cross-examination—Scope.)
State v. Landry, 29 Mont. 218..... 359
(Challenge to Jury—Grounds.)
State v. McKinney, 29 Mont. 375..... 405
(Statutes—Title—Unity of Subject.)
State v. Tudor, 47 Mont. 410..... 4
(Appeal—Exceptions Necessary.)
State v. Mitchell, 17 Mont. 67..... 154
(Statutes—Title.) DISTINGUISHED.
State v. O'Brien, 35 Mont. 482..... 194
(Justices' Courts—Appeals.)
State v. Peel, 23 Mont. 358..... 175
(Crime—Proof Required.)
State v. Rechnitz, 20 Mont. 488..... 434
(Larceny—Criminal Intent.)
State v. Tighe, 27 Mont. 327.....357, 359
(Challenge to Jury—Exception—Effect.)
State v. Northern Pac. Ry. Co., 27 Mont. 419..... 39
(Cited.)
State v. Western Union Tel. Co., 43 Mont. 445..... 39
(Cited.)
State (ex rel. Allen) v. Hawkins, 33 Mont. 177..... 581
(Nonappealable Orders.)
State (ex rel. Anaconda C. M. Co.) v. Clancy, 30 Mont. 529.....250, 251
(District Judges—Disqualification.)
State (ex rel. Arthurs) v. Board, 44 Mont. 51.....171, 172
(New Counties.)
(County Commissioners)..... 579
State (ex rel. Bogy) v. Board, 43 Mont. 533..... 169
(New Counties.)
State (ex rel. B. & M. etc. Co.) v. Clancy, 30 Mont. 193..... 251
(Disqualification of District Judges.)
State (ex rel. Breen) v. Toole, 32 Mont. 4..... 593
(Elections—Notice.)
State (ex rel. Carleton) v. District Court, 33 Mont. 138..... 251
(Disqualification of District Judges.)
State (ex rel. Cobban) v. District Court, 30 Mont. 93..... 192
(Justices' Courts—Appeals.)
State (ex rel. Cohn) v. District Court, 38 Mont. 119.....86, 87
(New Trial—Notice of Intention—Entry of Judgment.)
State (ex rel. Comrs.) v. State Board, 18 Mont. 389..... 244
(Indian Lands—Title.)

State (ex rel. Donlan) v. Commissioners, 49 Mont. 517..... 596
(*Mandamus.*)
State (ex rel. Eakins) v. District Court, 34 Mont. 226..... 148
(Administrators—Preference.)
State (ex rel. Foster) v. Ritch, 49 Mont. 155..... 523
(Bridges—Part of Highway.)
State (ex rel. Goodman) v. District Court, 46 Mont. 492..... 249
(Disqualification of District Judges.)
State (ex rel. Hackshaw) v. District Court, 48 Mont. 477.....579, 580
(Liquor Licenses—Appeal.)
State (ex rel. Hall) v. District Court, 34 Mont. 112..... 194
(Appeals are Statutory.)
State (ex rel. Hay) v. Alderson, 49 Mont. 387..... 477
(Statutes—Repeal.)
State (ex rel. Hay) v. Hindson, 40 Mont. 353..... 437
(Statutes—Repeal by Implication.)
State (ex rel. Heinze) v. District Court, 28 Mont. 227..... 598
(New Trial—Definition.)
(*Mandamus*—Does not Lie, When)..... 601
State (ex rel. Jenkins) v. District Court, 32 Mont. 595..... 249
(Disqualification of District Judges.)
State (ex rel. Kehoe) v. Stromme, 49 Mont. 25..... 276
(Statutory Construction—Surplusage.)
State (ex rel. Kohl) v. District Court, 46 Mont. 348..... 344
(Actions—Dismissal.)
State (ex rel. Lang) v. Furnish, 48 Mont. 28.....167 *et seq.*
(New Counties—Creation—Procedure.)
(County Commissioners—Powers)..... 579
State (ex rel. McGowan) v. Sedgwick, 46 Mont. 187..... 587
(Officers—Filling Vacancies.) REAFFIRMED.
State (ex rel. Neill) v. Page, 20 Mont. 238..... 590
(Officers—Vacancies.)
State (ex rel. Nissler) v. Donlan, 32 Mont. 256.....161 *et seq.*
(Rules of Court—Effect.)
State (ex rel. Rosenstein) v. District Court, 41 Mont. 100..... 193
(Justices' Courts—Appeals.)
State (ex rel. Root) v. McHatton, 10 Mont. 370..... 358
(Challenge to Jury—Grounds.)
State (ex rel. Rowe) v. District Court, 44 Mont. 318..... 561
(Officers—Removal—Accusation.)
(Same—Defenses—Pleading)..... 566
State (ex rel. Ryan) v. Board, 45 Mont. 188..... 566
(Officers—Removal—Defenses—Pleading.)
State (ex rel. Scharnikow) v. Hogan, 24 Mont. 383..... 441
(Constitution—Elections.)
State (ex rel. Seres) v. District Court, 19 Mont. 501..... 28
(Statutory Construction.)
(Justices' Courts—Appeals)..... 194
State (ex rel. Stiefel) v. District Court, 37 Mont. 298..... 344
(Actions—Dismissal.)
State (ex rel. Teague) v. Board, 34 Mont. 426.....404 *et seq.*
(Constitution—Amendments—Submission.)
State (ex rel. Walkerville) v. District Court, 29 Mont. 176..... 599
(New Trials.)
State (ex rel. Woods) v. Tucker, 15 Mont. 8..... 418
(Constitution—Amendments—Publication.)
Stephens v. Nacey, 47 Mont. 479..... 236
(Cited.)
Streicher v. Murray, 36 Mont. 45..... 576
(Equity—Laches.)

Sutton v. Lowry, 39 Mont. 462..... 71
(Right of Trial by Jury.)
Swain v. McMillan, 30 Mont. 433..... 555
(Mortgages.)
Sweetland v. Barrett, 4 Mont. 217..... 45
(Statute of Frauds.)

Tague v. Jno. Caplice Co., 28 Mont. 51..... 4
(Offer of Proof.)
Taylor v. Malta Mercantile Co., 47 Mont. 342..... 4
(Offer of Proof.)
Therriault v. England, 43 Mont. 376..... 201
(Negligence—Burden of Proof.)
Tracy v. Harmon, 17 Mont. 465..... 450
(Complaint—Insufficiency—Appeal.)
Trent v. Sherlock, 24 Mont. 255..... 545
(Corporations.)

Vreeland v. Edens, 35 Mont. 413.....87, 599
(New Trial—Notice of Intention—Waiver.)
(Implied Findings)..... 487

Walker v. Pennington, 27 Mont. 369..... 417
(Statutes—Mandatory and Directory.)
Washoe C. Co. v. Hickey, 46 Mont. 363..... 249
(Disqualification of District Judges.)
Wastl v. Montana U. Ry. Co., 17 Mont. 213..... 427
(Instructions—Singling Out Witness—Error.)
Watkins v. Watkins, 39 Mont. 367..... 4
(Briefs—Assignments of Error—Waiver.)
(Equity—Conclusiveness of Findings)..... 72
Weiss v. Hamilton, 40 Mont. 99..... 488
(Partnership.)
Western Iron Works v. Montana P. & P. Co., 30 Mont. 550....514 *et seq.*
(Mechanics' Liens.)
Wetzstein v. Largey, 27 Mont. 212..... 72
(Quitclaim Deeds—Effect.)
Wright v. Brooks, 47 Mont. 99..... 340
(Laches.)
Willoburn Ranch Co. v. Yegen, 45 Mont. 254..... 102
(Cited.)
Wilson v. Barbour, 21 Mont. 176..... 70
(New Trial Orders.)
Woods v. Berry, 7 Mont. 195..... 599
(Issue of Fact.)
Wortman v. Montana C. Ry. Co., 22 Mont. 266..... 93
(Contracts.)
Wyman v. Jensen, 26 Mont. 227.....314, 316
(Creditors' Bill.)

Yancey v. Northern Pac. Ry. Co., 42 Mont. 342..... 127
(Pleading and Proof.)
Yellowstone R. R. Co. v. Bridger Coal Co., 34 Mont. 545..... 599
(Trial—Appearance and Answer.)